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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 2332

WILLIAM OSCAR MATTOX, JR.,

Petitioner,

vs.

DALE CARSON, as Sheriff of Duval County, Florida,

Respondent.

CECIL FREDERICK LOWE,

Petitioner,

vs.

DALE CARSON, as Sheriff of Duval County, Florida,

Respondent.

APPENDIX

TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(Rendered March 25, 1970)
Before TUTTLE, WISDOM and BELL, Circuit Judges

BELL, Circuit Judge: In these two cases, consolidated for opinion purposes, the sheriff of Duval County, Florida appeals from judgments of the district court discharging appellees Mattox and Lowe, pursuant to petitions for habeas corpus, from custody. We reverse.

Appellees were Jacksonville City Councilmen. The situation giving rise to these proceedings stems from an investigation by the Duval County Grand Jury regarding larceny from the City of Jacksonville through the medium of purchases by appellees from a merchant with payments for the items purchased having allegedly been made out of the funds of the Recreation Department of the city.

Appellees were called to testify before the Grand Jury in July of 1966. At the time the Grand Jury had heard from many witnesses and, in the view of the district court, because of the earlier Grand Jury proceedings, appellees were "definite suspects and potential defendants" to the charge of larceny then being investigated. In these circumstances, the Grand Jury was unwilling to allow appellees to take advantage of the Florida Immunity statute,[1] which would normally immunize from

1. Fla. Stat. Ann. Sec. 932.29:

No person shall be excused from attending and testifying, or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against bribery, burglary, larceny, gaming or gambling, or of any of the statutes against the illegal sale of spirituous, vinous or malt liquors, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him

prosecution those subpoenaed to testify, as appellees had been, in a larceny investigation. *State ex rel. Mitchell v. Kelley*, Fla. 1954, 71 So. 2d 887, 895. Because of this unwillingness, the state attorney requested Mattox and Lowe, in their separate appearances, to sign written waivers of immunity. They acceded to the request and their subsequent testimony disclosed information which the district court found to be "relevant and material to the transactions forming the basis of the charges of grand larceny."

At the close of the Grand Jury investigations, separate informations for grand larceny were filed against appellees in the state criminal court. They immediately moved to quash the informations on the ground that the waivers of immunity were invalid. This contention rested on the argument that the waivers were executed without the advice of counsel and without warning as to their Fifth Amendment rights, all in violation of *Miranda v. State of Arizona*, 1966, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, and also that the waivers were otherwise not knowingly and voluntarily made. The motions were overruled. Appellees then sought writs of prohibition against their prosecution on the same ground. They were again unsuccessful. *State ex rel. Lowe v. Nelson*, Fla. App., 1967, 202 So. 2d 232; *State ex rel. Mattox v. Layton*, Fla. App., 1967, 202 So. 2d 206. These decisions were affirmed by the Florida Supreme Court. *State ex rel. Lowe v. Nelson*, Fla. 1968, 210 So. 2d 197; *State ex rel. Mattox v. Layton*, Fla., 1968, 210 So. 2d 199. The procedure followed by appellees in the Florida courts, in effect a pretrial appeal in criminal cases, is permissible under the Florida practice. We treat these proceedings as the exhaustion of state remedies insofar as the immunity question is concerned.

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may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him, upon any criminal investigation or proceeding.

After the failure of these state court efforts, appellees were confined in the Duval County jail pending arraignment and trial on the grand larceny charges. The petitions for writs of habeas corpus which are the subject of these appeals were then filed. They contended, in sum, as they had in the state courts, that the waivers of immunity under FSA Sec. 932.29, supra, were invalid.

The district court viewed the matter in light of the requirements of *Miranda v. Arizona*, supra, and whether they are applicable to a potential defendant subpoenaed to testify before a Grand Jury. The court then concluded that the Grand Jury investigation was indeed a "custodial interrogation" as contemplated by *Miranda*, and since it was undisputed that the petitioners were not given the *Miranda* warnings, the district court reasoned that the immunity waivers were invalid. Thus, Mattox and Lowe were ordered released from custody and rendered immune from any future prosecution on the charges of grand larceny.

We hold that the district court committed error in so ruling. Assuming *arguendo* that *Miranda* would apply to a Grand Jury investigation, and we expressly pretermit the question, *Miranda* does not have the scope given it by the district court. *Miranda* is directed to incriminating evidence, here such evidence as was adduced from appellees before the Grand Jury or the fruits thereof. In such event, and if *Miranda* applies, the failure to give the required warnings would not result in a complete dismissal of the information against appellees. The remedy in such a case lies in the exclusionary rule, not in a pretrial federal habeas corpus proceeding. Cf. *United States v. Blue*, 1966, 384 U.S. 251, 255-56, 86 S. Ct. 1416, 16 L. Ed. 2d 510. If appellees were subjected to a "custodial interrogation" as contemplated by *Miranda*, then the failure to warn them of the constitutional rights due under *Miranda* should be urged in the state court trials as a bar to the admission of any evidence, or fruits thereof, gained during the interrogations. *Miranda* does not authorize a complete dismissal of the criminal charges by reinstating the immunity rights of appellees.

If the question presented is considered under the test of *Johnson v. Zerbst*, 1938, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, that a waiver of a federal constitutional right must be knowingly and voluntarily made, appellees fare no better. There again the relief, as will be seen, would come in the form of asserting the exclusionary rule in the state trials.

The federal right here is to be found in the Fifth Amendment privilege against self-incrimination as it relates to the Florida Immunity statute. The Florida right of immunity which prevents prosecution altogether exceeds the scope of the Fifth Amendment privilege. The federal right which may be asserted in a federal habeas court is limited by the outer limits of the Fifth Amendment privilege. These outer limits for the purposes of this case are found in *Gardner v. Broderick*, 1968, 392 U.S. 273, 276, 88 S. Ct. 1913, 20 L. Ed. 2d 1082, where the court said:

> ". . . The privilege may be waived in appropriate circumstances if the waiver is knowingly and voluntarily made. Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying. Counselman v. Hitchcock, supra, at 585-586, 35 L. Ed. at 1122; Murphy v. Waterfront Commission, supra, at 79, 12 L. Ed. 2d at 695."[2]

It is thus clear that a federal habeas corpus court must leave such federal questions as may possibly arise under the

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2. This dictum, as to the privilege in immunity situations being vouchsafed by the exclusionary rule, is contrary to the dictum in *Counselman v. Hitchcock*, 1892, 142 U.S. at 585-86, 36 L. Ed. at 1122, that the privilege under immunity statutes, must be supplanted by absolute immunity from prosecution. For the ratio decidendi of *Counselman v. Hitchcock*, see the fact recitals. 142 U.S. at 564-65. Cf. *Murphy v. Waterfront Commission of New York*, 1964, 378 U.S. 52, 78-80 84 S. Ct. 1594, 12 L. Ed. 2d 678. See also *Byers v. Justice Ct of Mendocino City*, Calif. Sup. Ct., September 16, 1969, 38 LW 2211; and *In re Zicarelli*, N. J. Sup. Ct., January 20, 1970, 38 LW 2428.

Fifth Amendment aspect of the Florida Immunity statute to the state trial courts under the exclusionary rule. This includes questions as to the validity of the waivers.

REVERSED with direction to dismiss the petitions for habeas corpus.

APPENDIX B

OPINION OF THE COURT OF APPEALS DENYING PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Rendered May 6, 1970)
Before TUTTLE, WISDOM and BELL
Circuit Judges

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

(Rendered January 10, 1969)
ORDER GRANTING PETITION FOR HABEAS CORPUS

This cause came on for hearing on petition for habeas corpus by William Oscar Mattox, Jr., and Cecil Frederick Lowe, pursuant to 28 U.S.C.A. Sec. 2254, attacking the legality of petitioners' custody. The facts in both cases are identical except for the testimony given by each petitioner before the Duval County Grand Jury, which is the same in substance. Therefore, except for minor variances, the two petitioners for writs of habeas corpus are the same.

Subsequent to their release on bond in State Court and at the time these petitions for habeas corpus were filed, petitioners were confined by Dale Carson, as Sheriff of Duval County, Florida, in the Duval County Jail, Jacksonville, Florida, under separate informations for grand larceny pending against each of them as defendants in the Criminal Court of Record of Duval County, Florida, Division C. Pending final judgment in this cause, this Court entered an order pursuant to Title 28, U.S.C.A., Sec. 2251, staying the proceedings in the Criminal Court of Record of Duval County, Florida, and petitioners were then released on bond in this Court.

After the filing of said informations against them in the Criminal Court of Record, petitioners filed sworn motions to quash in the Criminal Court of Record on the grounds that they were compelled to testify before the Grand Jury of Duval County, Florida, on July 14, 1966, when they were potential defendants to the charges then being investigated by the Grand Jury, and that the alleged waivers of their constitutional privileges and their immunity under Section 932.29, Florida

Statutes, F.S.A., were null and void since the waivers were executed without the advice of counsel and the required warnings of their constitutional privileges were not given to them. The State of Florida admitted all the facts in said motions to quash by filing demurrers thereto.

On November 18, 1966, the Criminal Court of Record entered orders sustaining the State's demurrers to the petitioners' motions to quash the informations. Afterwards, petitioners filed suggestions for writs of prohibition in the First District Court of Appeal of Florida, alleging that the Criminal Court of Record of Duval County lacked jurisdiction to try petitioners and that for the State of Florida to continue prosecuting petitioners was a violation of their rights guaranteed to them by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. Petitioners' suggestions for prohibition were denied by the First District Court of Appeal of Florida. State ex. rel. Mattox v. Layton, 202 So. 2d 206 (Fla. App. 1967); State ex. rel. Lowe v. Nelson, 202 So. 2d 232 (Fla. App. 1967). Petitioners then filed petitions for writs of certiorari to the Supreme Court of Florida, which Court issued writs of certiorari to the First District Court of Appeal of Florida and subsequently affirmed the latter Court's decisions. State ex. rel. Mattox v. Layton, 210 So. 2d 199 (1968); State ex. rel. Lowe v. Nelson, 210 So. 2d 197 (1968). Petitions for rehearing were denied by the Supreme Court of Florida on June 4, 1968.

Petitioners allege that their custody is unlawful and illegal and contrary to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution based upon the grounds and facts set forth below.

The Spring Term of the Grand Jury of Duval County, Florida, conducted an investigation, inquiry and proceeding into the larcenies of moneys and other personal items from the City of Jacksonville, a municipality, in connection with the fraudulent acquisition of personal items of merchandise from the Harry Finkelstein Company, Jacksonville, Florida, for the personal use of certain individuals, which merchandise was

then paid for through the City Recreation Department of the City of Jacksonville. Prior to July 13, 1966, this Grand Jury had heard many witnesses' testimony and had adduced before it many documents in reference to said larcenies. On that day petitioners were definite suspects and potential defendants of the larcenies then being investigated by the Grand Jury and were so considered by the said Grand Jury and the State Attorney of the Fourth Judicial Circuit of Florida in and for Duval County, Florida, by reason of the evidence previously adduced and heard by the Grand Jury.[1] The Grand Jury then ordered and caused to be issued by the Clerk of the Circuit Court of Duval County, Florida, witness subpoenas requiring petitioners to appear before the Grand Jury to testify. Petitioners were each administered the oath and interrogated in reference to the larcenies from the City of Jacksonville. Their testimony disclosed information relevant and material to the transactions forming the basis of the charges of grand larceny subsequently charged in the informations.

While petitioners were in the Grand Jury Room, the State Attorney for the Fourth Judicial Circuit handed to petitioners and requested them to sign a written waiver of the inimunity to which petitioners would be entitled under Section 932.29, Florida Statutes, F.S.A., in lieu of the constitutional privilege to remain silent and not incriminate themselves under the Constitution of the United States of America.[2]

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1. See the transcripts of record filed in the First District Court of Appeal of Florida in the *Mattox* and *Lowe* cases, supra, p. 16-20 of transcripts.

2. Section 932.29, Florida Statutes, F.S.A., reads as follows:
"No person shall be excused from attending and testifying, or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against bribery, burglary, larceny; gaming or gambling, or of any of the statutes against the illegal sale of spiritous, vinous or malt liquors, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty

After petitioners went before the Grand Jury the State Attorney requested that the waivers of immunity be signed. Petitioners had not consulted with a lawyer prior to or during their appearances before the Grand Jury, nor had they been advised that they had a right under the United States Constitution or Section 932.29, Florida Statutes, F.S.A., to consult with a lawyer. Petitioners had not been advised about the waiver of any such rights and privileges in reference to their testimony before the Grand Jury. They were not advised that if they did not have the financial ability or resources to employ an attorney that an attorney would be appointed to advise and represent them before and during such interrogation. Petitioners were not advised that they had a right to remain silent under the United States Constitution unless the immunities and privileges under Section 932.29, Florida Statutes, F.S.A., were accorded them; and that if they did not remain silent anything that they said might be and could be used against them, either then or in a subsequent proceeding. Petitioners were not advised that they had the right to exercise any of these rights and privileges at any time during the interrogation or that they were definite suspects and potential defendants to the charges of grand larceny then being investigated by the Grand Jury.

In the absence of any warnings or explanations of their rights and privileges under the United States Constitution, petitioners signed the waivers of immunity before the Grand Jury without the advice of counsel.

Federal jurisdiction in these cases is sought under 28 U.S.C. Sec. 2254 because of the alleged violation by the State of Florida of the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Respondent contends that this Court lacks jurisdiction to entertain the present petitions

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or forfeiture, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

under 28 U.S.C. See 2254, since petitioners are not held pursuant to any State Court *judgment* as required to properly confer jurisdiction on this Court. Respondent contends that petitioners' claim for relief is premature, pointing out that petitioners are each in custody merely by operation of a capias for arrest issued pursuant to Section 932.48, Florida Statutes, F.S.A.

Section 2254, U.S.C., Title 28, uses the term "judgment" not "final judgment". Quite obviously the Supreme Court of Florida, by affirming the decision of the First District Court of Appeal on certiorari, has entered its judgment denying the petitioners immunity and holding them for trial. To hold that a "final judgment" is a prerequisite to habeas relief would require petitioners to stand trial. This would be a direct violation of Section 932.29, Florida Statutes, F.S.A., which specifically grants immunity from prosecution. Such a statutory enactment, to be valid, must afford absolute immunity against future prosecution for the offense to which the incriminating questions related. Counselman v. Hitchcock, 142 U.S. 547, 12 S. Ct. 195, 35 L. Ed. 1110 (1892); Cf. Albertson v. Subversive Activities Control Bd., 382, U.S. 70, 86 S. Ct. 194, 15 L. Ed. 2d 165 (1965). Under the principles of Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 838 (1963), the habeas corpus jurisdictional prerequisite is not the judgment of a State Court but "detention simpliciter." The Supreme Court in Fay v. Noia, stated:

> "The entire course of decisions in (the Supreme Court of the United States) elaborating the rule of exhaustion of state remedies is wholly incompatible with the proposition that a state court *judgment* is required to confer federal habeas jurisdiction. * * * Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined the federal court has the power to release him." *Fay*, supra, at 430, 83 S. Ct. at 844.

This language has not been altered by the amendment of Sec. 2254 on November 2, 1966. White v. Swenson, 261 F. Supp. 42

(W.D.Mo. 1966). The existence of a "judgment" is not a vital ingredient for Federal habeas jurisdiction. See Falgout v. Trujillo, 270 F. Supp. 685 (D.Colo. 1966), aff'd 380 F. 2d 376 (10th Cir. 1967); Plummer v. State, 262 F. Supp. 1021, 1023 (E.D.La. 1967); Foster v. Gilbert, 264 F. Supp. 209 (S.D. Fla. 1967).

Contrary to respondent's contentions, the petitions for habeas corpus are not premature and this Court has jurisdiction to determine the issues raised by petitioners. The jurisdictional prerequisite is not a judgment of a State Court but, rather, detention itself.

Respondent does not deny that petitioners have exhausted their remedies. Neither does he deny that the actual merits involve Federal rights controlled by Federal law. Therefore, we proceed to the merits.

The sole question before this Court is whether or not the principles and safeguards announced in Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 15 L. Ed. 2d 694 (1966), are applicable to a suspect and potential defendant who is required by a witness subpoena to appear before a State Grand Jury which is investigating the witness' alleged crimes where the State has an immunity statute which is applicable to the Grand Jury proceedings.

The First District Court of Appeal of Florida recognized in its opinion that this Federal question was the only point involved when it stated:

> "The record before us indicates that no statements were made to the relator to the effect that he had a right to counsel, retained or appointed, before he executed the waiver and responded to questions put to him by the Grand Jury. If Miranda is applicable here, then that single omission would be sufficient to make out the relator's case." State ex. rel. Lowe, supra, at 234.

The Supreme Court of Florida adopted this opinion in State ex. rel. Lowe v. Nelson, 210 So. 2d 197 (1968).

It is argued by the respondent that the principles of *Miranda* are not applicable here because a Grand Jury proceeding is not a critical stage of prosecution. While it is true that only probable cause was being determined, and that an information could have been filed regardless of whether an indictment was returned, petitioners were the targets of investigation and were definite suspects of the alleged larcenies.[3] Incriminating statements made during the Grand Jury questioning could be used against the defendants at the trial. A confession of guilt made in the secrecy of a Grand Jury room would affect the whole trial.

The Supreme Court of the United States has already recognized that a Grand Jury proceeding can be a critical stage of a trial. See Hamilton v. Alabama, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961); Messiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). According to Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), the accused must be permitted to consult with his lawyer when the process has shifted from "investigatory to accusatory". *Escobedo*, supra, at 492, 84 S. Ct. 1758, 1765. For this Court to deprive petitioners of the constitutional right to consult with counsel until after the Grand Jury proceedings would be tantamount to rendering worthless their Six Amendment right "to have the assistance of counsel for (their) defense."

Respondent maintains that the contention raised by petitioners as to their right to be advised by counsel is not appropriate since there was no "custodial interrogation" as contemplated by *Miranda*. However, the language of *Miranda* clearly shows that its principles are not confined to police station interrogation. Under that decision,

> "the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons

3. The State did not traverse any of the allegations contained in petitioners' motions to quash. Instead, the State filed a demurrer to these motions, admitting as true the allegations contained therein. See Wilson v. State, 134 Fla. 390, 184 So. 31 (1938).

> in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. * * * Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest." *Miranda,* supra, at 467, 469, 86 S. Ct. 1602, at 1625.

In *Miranda,* custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda,* supra, at 444, 86 S. Ct., at 1612.

Several Courts have held that interrogation of a suspect under circumstances similar to those under which petitioners were each interrogated was "in custody interrogation." See State v. Ruggeri, 19 Utah 2d 216, 429 P. 2d 969 (1967); State v. Sarcone, 96 N.J. Super. 501, 233 A. 2d 406 (1967); State v. Rosania, 96 N.J. Super. 515, 233 A. 2d 413 (N.J. 1967); People v. Arnold, 66 Cal. 2d 438, 426 P. 2d 515, 58 Cal. Reptr. 115 (Cal. 1967); People v. Reason, 52 Misc. 2d 425, 276 N.Y. S. 2d 196 (1966); Commonwealth v. Jefferson, 423 Pa. 541, 226 A. 2d 765 (1967);

Respondent complains that if the *Miranda* warnings are applicable to petitioners before the Grand Jury proceedings, then petitioners would be entitled to the presence of counsel before these hearings which would be contrary to Section 905.17, Florida Statutes, F.S.A., since that statute prohibits counsel from being present in the Grand Jury room. However, we are not determining petitioners' rights to the presence of counsel before the State Grand Jury. The determination before this Court is limited to whether petitioners were entitled to the Miranda warnings and thus the right to be advised by counsel and to confer with counsel before being asked to execute the waivers.

It is clear that the Grand Jury proceedings were investigatory proceedings for the alleged violation of a Florida statute

against larceny.[4] Producing evidence before a Grand Jury in reference to the crime of larceny immunizes the witness under Section 932.29, Florida Statutes, 1965, F.S.A. State ex. rel. Byer v. Willard, 54 So. 2d 179, 182 (Fla. 1951); State ex. rel. Johnson v. MacMillan, 194 So. 2d 627, 635 (Fla. App. 1967).

Under Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), the Fifth Amendment is made applicable to the State under the Fourteenth Amendment. Since the immunity provided by Section 932.29, Florida Statutes, F.S.A., stands in the stead of the Fifth Amendment privileges against self-incrimination, and gives the same protection to citizens, it should be construed as liberally as the Fifth Amendment. See *Counselman*, supra, at 562, 563, 12 S. Ct. 195; Stevens v. Marks, 383 U.S. 234, 86 S. Ct. 788, 15 L. Ed. 2d 724 (1966); Florida State Board of Architecture v. Seymour, 62 So. 2d 1, 3 (Fla. 1952); Ex Parte Senior, 37 Fla. 1, 19 So. 652, 654, 32 A.L.R. 133 (1896); State ex rel. Reynolds v. Newell, 102 So. 2d 613, 616 (Fla. 1958). It follows, therefore, that the same requirements which are necessary to constitute a valid waiver of the constitutional right against self-incrimination are required to waive immunity under Section 932.29, Florida Statutes, F.S.A. Accordingly, we think that the *Miranda* warnings are applicable where the immunity statute is involved and parties are subpoenaed before a State Grand Jury to testify as potential defendants for the crime of larceny. In the absence of a valid waiver petitioners were immunized under Section 932.29, Florida Statutes, F.S.A., by giving their testimony before the Duval County Grand Jury, and they could not be prosecuted for the offenses for which they were indicted.

Petitioners contend that their written waivers were invalid because the State failed to give them any warnings of their constitutional privileges and rights under Section 932.29, Florida Statutes, F.S.A. The First District Court of Appeal found

4. See the transcript of record in State ex. rel. Mattox v. Layton, supra, pp. 32-62 of transcript, and the transcript of record in State ex. rel. Lowe v. Nelson, supra, pp. 32-69 of transcript.

that petitioners' waivers of immunity were valid and that no factual coercion was present. However, from a careful reading of *Miranda*, supra, it is apparent that the *Miranda* warnings are a pre-requisite to any in-custody interrogation. *Miranda*, supra, at 471, 478, 86 S. Ct. 1602, at 1626, 1630. In the absence of these warnings we think that the waivers were invalid regardless of any showing of coercion or intimidation by petitioners.

In *Miranda*, supra, and *Escobedo*, supra, no immunity statute was involved. The Supreme Court of the United States in each case suppressed the illegal admissions and reversed for new trials. When an immunity statute is involved the matter is more than evidentiary. Where there has been no valid waiver of the immunity statute, the defendants must be dismissed from further prosecution. See State ex rel. Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954); State ex rel. Byer v. Willard, 54 So. 2d 179 (Fla. 1951). Cf. People v. Straehle, 53 Misc. 2d 512, 279 N.Y.S. 2d 115 (1967); State v. Milam, 210 Miss. 13, 48 So. 2d 594, 49 So. 2d 806 (1950). In addition, the following language appears in *Miranda*:

> "*After* such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer question or make a statement. *But unless and until* such warnings and waivers are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him". *Miranda*, supra, at 478, 86 S. Ct. 1602, at 1630. (emphasis supplied)

Under the immunity statute, Section 932.29, Florida Statutes, F.S.A., petitioners are released from custody and free from any further criminal prosecution on the charges of grand larceny.

It is so ordered and final judgment shall issue in accordance with this opinion.

/s/ Charles R. Scott

Judge

APPENDIX D

OPINION OF THE SUPREME COURT OF FLORIDA
(Rendered April 24, 1968)

Before CALDWELL, THOMAS, DREW, THORNAL, ERVIN, ROBERTS AND ADAMS, Justices

PER CURIAM.

The writ of certiorari has issued in this cause pursuant to certificate of the District Court of Appeal, 1st District, under Article V, Section 4, of the Florida Constitution, F.S.A. and Rule 4.5, subd. c, Florida Appellate Rules, 32 F.S.A.

The views expressed and the conclusion reached by the majority in the very able and thorough opinion of the appellate court, 202 So. 2d 232, are in our opinion correct. That opinion, and the judgment denying writ of prohibition against prosecution of petitioner for grand larceny in the Criminal Court of Record of Duval County, should accordingly be adopted as the opinion and judgment of this Court.

It is so ordered.

CALDWELL, C. J., and THOMAS, DREW and THORNAL, JJ., concur.

ERVIN, J., concurs specially with opinion.

ROBERTS and ADAMS, JJ., dissent.

ERVIN, Justice (specially concurring in the denial of certiorari):

The mandate of Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is applicable to a custodial interrogation conducted pursuant to a grand jury investigation of suspected criminal activities. A properly constructed adversary system of criminal justice must contain

safeguards against overzealous official attempts to compel evidence from the mouth of a person who stands "accused" of criminal activities, whether in a police or prosecuting attorney or grand jury interrogation. Miranda v. State of Arizona was designed to superimpose safeguards upon the state systems of criminal justice which would function in all custodial interrogations.

In the instant case, it appears that Petitioner was subpoenaed before the grand jury not as an ordinary witness but as a target of the investigation being conducted. Accordingly, the critical stage of due process was reached when the Petitioner virtually stood as a person accused before the grand jury and under the Miranda mandate he was entitled to the mantle of protection afforded thereby. In the event of a failure to apply the Miranda requirements, the rule is that the state may not introduce statements secured as a product of the custodial interrogation of the accused.

Because the state is prosecuting him for an offense concerning which he was questioned before the grand jury, Petitioner contends the state's failure to adhere to the Miranda safeguards when it obtained his waiver of immunity from prosecution preliminary to his testimony before the grand jury immunizes him completely from prosecution for such offense. The Petitioner has failed to properly distinguish the restraints and safeguards of Miranda and the immunity secured by Section 932.29, Florida Statutes, F.S.A.

Briefly stated, Section 932.29 provides that a person compelled to give testimony concerning certain designated crimes is forever immune from prosecution for criminal activities concerning or related to the compelled testimony. See State ex rel. Mitchell v. Kelly, 71 So. 2d 887 (Fla. 1954). The statute in essence supplants the constitutional privilege against self-incrimination by immunizing the witness from prosecution. The obvious purpose of the statute is to permit state prosecuting officials to obtain evidence which might otherwise be denied to them by the witness' exercise of the privilege against

self-incrimination. See Lewis v. State, 155 So. 2d 841 (2d DCA Fla. 1963).

In the instant case, the record reveals that Petitioner executed a written waiver relinquishing the immunity granted by the statute. It appears that under the existing law of this state the voluntary nature of this waiver as evidenced by the record determines the extent of the effectiveness of such waiver so far as relinquishment of Petitioner's statutory right of immunity is concerned. The offer of counsel and other Miranda requirements were not critical prerequisites to the execution of a valid waiver of the statutory right of immunity. The Miranda safeguards embrace only the Fifth Amendment privilege against self-incrimination and are not applicable to any statutory substitute of the privilege. Once it appears that the statutory substitute of immunity is intelligently relinquished, Petitioner is relegated to the protection afforded by the constitutional privilege itself and it is at this point that the Miranda safeguards become operative. Accordingly, the failure to observe the Miranda requirements in the instant case does not restore Petitioner's statutory right of immunity which was duly waived but, if he timely objects, Miranda may preclude the state from making use at his trial of any statements elicited from him by the interrogation conducted by the grand jury. In the present case, it may well be that the state has evidence of Petitioner's alleged criminal activities—perhaps from a source other than the mouth of the Petitioner—which is not tainted by violations of the Miranda safeguards. If this be the case, such evidence is admissible in a proceeding brought to secure conviction of Petitioner.

In summary, statutory immunity from prosecution and an intelligent waiver thereof are in a separate category from Miranda requirements. There is complete dichotomy between the two. Here, the Petitioner intelligently waived his statutory immunity from prosecution. The state was then free to prosecute Petitioner as if he had never appeared before the grand jury, but at the trial the Petitioner is entitled to the benefit of

all rules relating to trial evidence and due process, including Miranda. Therefore, at trial in the prosecution of Petitioner, if it appears incriminating testimony was taken from him in the grand jury room and such testimony is sought to be introduced, it may be found inadmissible on timely objection if Miranda requirements were not complied with as a predicate to taking such testimony. Petitioner was entitled to the Miranda warnings if he became the criminal target of the grand jury interrogation. He also should have been advised of his right to counsel to represent him and, if not intelligently declined, he should have had counsel beside him in the grand jury room to advise him when he testified.

For the reasons stated, I see no justification for prohibiting prosecution of the Petitioner and accordingly would affirm the judgment denying the rule nisi.

APPENDIX E

OPINION OF THE SUPREME COURT OF FLORIDA

(Rendered April 24, 1968)
Before CALDWELL, THOMAS, DREW THORNAL, ERVIN, ROBERTS and ADAMS, Justices

PER CURIAM:

Pursuant to writ of certiorari issued herein the decision of the District Court of Appeal, 1st District, has been reviewed and should be adopted on authority of the order of this Court in the companion case of State ex rel. Lowe v. Nelson, Fla. 1968, 210 So. 2d 197, and the opinion appearing at Fla. App. 202 So. 232.

It is so ordered.

CALDWELL, C.J., and THOMAS, DREW and THORNAL, JJ., concur.

ERVIN, J., concurs, but see my special concurring opinion filed in State ex rel. Lowe v. Nelson, Fla. 1968, 210 So. 2d 198.

ROBERTS and ADAMS, JJ., dissent.

APPENDIX F

OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT
(Rendered September 15, 1967)

Before SPECTOR, WIGGINTON and JOHNSON, Judges

SPECTOR, Judge.

The relator has filed a suggestion for the issuance of a rule nisi in prohibition against the respondent to prohibit the latter from further prosecution of the relator on a charge of grand larceny.

As grounds for his suggestion, the relator contends that he has become immunized from prosecution on that charge by operation of the State's immunity statute, Section 932.29, Florida Statutes, F.S.A., by reason of having been required under subpoena to testify before the Grand Jury, Spring Term, 1966, of Duval County, Florida, concerning the grand larceny charge now faced by him in the Criminal Court of Record of Duval County. Although a written waiver of the immunities afforded by Section 932.29 was executed by the relator, it is his contention that said waiver is a nullity because it was executed without benefit of the warnings prescribed by the United States Supreme Court in Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, decided June 13, 1966.

The facts underlying the instant proceeding are briefly the following. Mr. Cecil Lowe, the relator, at the time of the incident complained of was a member of the City Council of Jacksonville, Florida, an office to which he had initially been elected almost twenty years earlier and held continuously since. On July 13, 1966, one month after Miranda, a witness subpoena was served on Mr. Lowe commanding him to appear before the Grand Jury as a witness on the following day.

The transcript of the proceedings before the Grand Jury reveals that Mr. Lowe was advised that the Grand Jury "° ° ° is engaged in an investigation relating to larcenies of money from the City of Jacksonville, Florida, concerning purchases of various merchandise from the Harry Finkelstein Company of Jacksonville, Florida." He was further advised that "° ° ° this investigation is brought within the terms and provisions of our immunity statute.

"Under the laws of the State of Florida, when a person is called before the Grand Jury in connection with certain enumerated offenses, the law provides a person as called to testify, cannot refuse to testify on the grounds his testimony might incriminate him. ° ° ° The law gives complete immunity to such person from any prosecution. ° ° ° Do you understand?

"Yes, sir, I think I do.

"° ° ° are you willing to waive your immunity?"

At this point in the proceedings, the State Attorney advised Mr. Lowe that the Grand Jury would not be interested in granting him complete immunity. It seems to us that this statement was enough to put the witness on notice that if he did not sign the waiver of immunity, he would not be interrogated by the Grand Jury.

The written waiver of immunity which was thereupon executed by the relator sets forth that under the laws of this State a person may not be prosecuted for offenses questioned upon by the Grand Jury unless such immunity is waived and said instrument concludes with language which imports on its face that it was given voluntarily.

The full thrust of relator's suggestion is that the waiver of immunity made by him both in writing and orally before the Grand Jury is constitutionally tainted, and thus a nullity, for the reason that the Miranda warnings were not given to the witness prior to the waiver. This contention is advanced by the relator even though the record fails to reveal any factual coercion leading to the execution of the waiver.

Accordingly, this Court is faced with the need to determine whether the principles enunciated by the United States Supreme Court in Miranda are applicable to proceedings before a state grand jury; and, secondly, if they are not so applicable, whether this Court will extend Miranda to such a proceeding.

In its opinion deciding Miranda and the three companion cases, the Supreme Court summed up its holding at 384 U.S. 444, 86 S. Ct. 1612, 16 L. Ed. 2d 706, in the following language:

> "* * * the prosecution may not use statements whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. * * * Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. * * *"

The record before us indicates that no statements were made to the relator to the effect that he had a right to counsel, retained or appointed, before he executed the waiver and responded to questions put to him by the Grand Jury. If Miranda is applicable here, then that single omission would be sufficient to make out the relator's case. An examination of Miranda and its companion cases shows that in each of the four cases the defendants made either written or oral confessions during the course of interrogation by police. In each case, the interrogation and confession occurred while the accused was in the physical custody of the police. Miranda was interrogated while held in custody in the Phoenix police station and confessed. Vignera was interrogated while held in two separate detective squad headquarters in New York and confessed. Westover was interrogated by both the local police and F.B.I.

while held in the Kansas City police station and confessed. Stewart was interrogated while held in custody at the Los Angeles police station and confessed. In each of the cases, the confession was admitted against the defendants. In each instance, the defendant had been subjected to custodial interrogation while in the custody of the *police*. In the instant case, the interrogation complained of did not occur while Mr. Lowe was in the custody of the police nor in the private office of a prosecuting official. On the contrary, the interrogation occurred before a Grand Jury composed of the relator's fellow citizens as prescribed by statute. A court reporter was present and the Grand Jury was operating under the direct supervision of the Circuit Court.

The Court in Miranda at 384 U.S. 477, 86 S. Ct. 1629, 16 L. Ed. 2d 725, stated:

> "The principles announced today deal with the protection which must be given to the privilege against self-incrimination *when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way.*" (Emphasis supplied.)

Earlier in 384 U.S. 461, 86 S. Ct. 1620 and 16 L. Ed. 2d 716, we find the following:

> "We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, *where there are often impartial observers to guard against intimidation or trickery.*" (Emphasis supplied.)

It is our opinion that the above language taken from Miranda serves to distinguish police custodial interrogation from

interrogation by the grand jury even though the *presence* of the witness before the grand jury is compelled. From what we gather, Miranda is applicable to interrogations in the "isolated setting of the police station" and not those occurring "in courts or other official investigations" where there are impartial observers to guard against intimidation and trickery being employed to compel the witness to give evidence against himself. It is our view that grand jury proceedings are not such lend themselves to the coercive police tactics, isolated though they may be, which prompted the Supreme Court to wield its broad Miranda brush to affect questionable cures even where no ills were present.

In the case at bar, there is no contention by the relator that his waiver was in any way coerced, either physically or psychologically, by the grand jury or its agents nor could such contention be made for the record of the preceedings refutes such an argument even before it is made.

Relator cites Garrity v. State of New Jersey, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562, in support of the proposition that a waiver given by a witness appearing before the grand jury was invalid, but that case is not persuasive here for in Garrity, it was held that the threatened loss of the witness's office should he not testify amounted to a coercion of the witness's testimony. In the instant case, no such threat was held over the relator's head. Relator also relied on the application of Miranda by the Courts in People v. Arnold, Cal., 58 Cal. Reptr. 115, 426 P. 2d 515 (1967); People v. Reason, 52 Misc. 2d 425, 276 N.Y.S. 2d 196 (N.Y. Dec. 1966); Commonwealth v. Jefferson, 423 Pa. 541, 226 A. 2d 765 (1967); and People v. Kelley, Cal., 57 Cal. Reptr. 363, 424 P. 2d 947 (1967). Each of these cases were post Miranda decisions in which the Court held that Miranda warnings were necessary prior to interrogation, but in each of these cases the custody in which the suspect was held was of a type during which unwitnessed or coercive pressures could be used upon the suspect rather than the type recognized by the Supreme Court in Miranda

at 384 U.S. 461, 86 S. Ct. 1621, "° ° ° where there are often impartial observers to guard against intimidation or trickery."

In a decision which straddled Miranda in point of time, our own Supreme Court in Gordon v. Gerstein, 189 So. 2d 873, affirmed a decision of the Third District Court of Appeal, reported at 183 So. 2d 285, holding that a witness summonsed to give testimony before a prosecuting official was not entitled to have counsel present. The Supreme Court's opinion in Gordon was filed May 25, 1966, some twenty days before Miranda, but denied rehearing in an opinion dated September 21, 1966, sometime after Miranda. In State v. Stallings, 154 Conn. 272, 224 A. 2d 718 (Nov. 1966), in a post Miranda decision, the Supreme Court of that state held that under the practice of that state proceedings before the grand jury are not such a critical stage in the administration of criminal justice so as to require that a witness's counsel be present with him while he appears before the grand jury. In United States v. DiMichele, 375 F. 2d 959 (3d Cir. 1967), the Federal Court in a post Miranda decision rejected the contention that a witness before the Federal Grand Jury was entitled to a warning of his rights to counsel.

The Courts of Florida have not yet held that Miranda is applicable to a witness appearing before the grand jury. We are not inclined to make that extension for the simple reason that the real or imagined reasons underlying Miranda do not exist in our grand jury proceedings. A court reporter and a broad representative group of community citizens are present to serve as impartial observers to guard against intimidation or trickery. Should safeguards not be present, our view of the non-applicability of Miranda might differ.

The suggestion for issuance of a rule nisi is therefore denied.

WIGGINTON, C. J., concurs.

JOHNSON, J., dissents.

JOHNSON, Judge, dissenting.

I cannot agree with the conclusions reached in the majority opinion in this case for the reasons hereinafter enumerated.

In order to properly premise my opinion, I need to restate some of the more pertinent facts as they actually existed. I think this is necessary to demonstrate that the latest United States Supreme Court decisions on the question involved are applicable and determinative of a view contrary to that announced in the majority opinion in this case.

The defendant was a city councilman and had been for years. The Grand Jury of Duval County had been engaged in investigation of certain rumored, at least, business irregularities by the City officials. He was subpoenaed to appear before the Grand Jury at a certain hour of a certain day and to testify. This subpoena carries with it the power of compulsion—the power to compel the witness to appear and to testify. He has no alternative. It is true that in order to not render the statute requiring the witness to testify unconstitutional, . . . "under the constitutional" . . . provisions against self-incrimination, the statute provides that when a person does so testify, he shall not be subject to prosecution for or on account of any *transaction, matter* or thing concerning which he so testified, and no testimony or evidence so given or produced, shall be received against him upon any criminal proceeding.

It appears from the transcript of the proceedings before the Grand Jury, that the State Attorney, told the defendant, after he had been *brought into* the Grand Jury Room (which excluded all persons except the jurors and State Attorney and his assistants) that the investigation was about certain larcenies against the City of Jacksonville, with particular reference to certain purchases from Harry Finkelstein Co., also, that the investigation is into matters brought within the terms and provisions of our immunity statute. He, the State Attorney, also pointed out that when a person is called before the Grand Jury to testify in connection with certain enumerated offenses, the law provides that since he can't refuse to testify on the grounds his testimony might incriminate him, the law gives complete immunity. He then asked the defendant if he understood. The defendant's answer left some doubt, when he said: "Yes, sir,

I think I do." The State Attorney then handed the defendant a rather long typewritten paper and explained that said paper was a waiver of immunity and was "about what he had just explained to him" or similar words, and told him he wanted him to sign it. He also told him he could read it if he wanted to. The record does not disclose whether the defendant read it or not. He further stated that this Grand Jury "does not want to give you a complete immunity."

To me, the necessity for the waiver of immunity and statement that the Grand Jury did not want to give the defendant complete immunity, and the further fact the Assistant State Attorney while interrogating the defendant, reminded him of perjury, and also pointed out that the State had purchase orders from Finkelstein for the television and certain other articles, all point to the one fact that this defendant, at the time the subpoena was issued and at the time he first appeared in the Grand Jury, was more than just a witness. He was a defendant—a definite suspect. This was no longer an investigation into an unsolved crime. This had focused upon a definite suspect, as pointed out in Escobedo v. State of Illinois.[1] Therefore, the constitutional provision against self-incrimination is applicable. Regardless of whether the answers to interrogatories were exculpatory or inculpatory, the prosecution could not use statements stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.[2]

This then brings to bear three questions:

(1) Was the interrogation by the State Attorney and Grand Jury in "custody" interrogation, so that Miranda[3] is applicable?

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1. Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L Ed. 2d 977.

2 State of Utah v. Ruggeri, Utah, 429 P. 2d 969, 973.

3. Miranda v. State of Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694.

(2) Were the requisite constitutional rights of the defendant pointed out to him so that he could intelligently waive immunity?

(3) Was the waiver of immunity valid?

The State contends, and the majority of this panel of the Court agree, that the inquisition by the Grand Jury was not a "custodial interrogation" and therefore the United States Supreme Court case of Miranda does not apply. The contention is that in Miranda and the other three cases combined for consideration in the one opinion as found in 384 U.S. 444, 86 S. Ct. 1602, 16 L. Ed.2d 706, the defendants had been arrested and interrogated in police stations. This is true, but, before getting to specifics of the four cases included in the Miranda case, Chief Justice Warren specifically pointed out that the Court (the U.S. S. Ct.) should clear up the uncertainties left suspended in previous decisions including Escobedo, with reference to the defendant's rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

We find the following language used in Miranda v. State of Arizonia in 384 U.S. 467, and 86 S. Ct. at page 1624:

> "Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of Criminal Court proceedings and serves to protect persons in all settings in which *their freedom of action is curtailed from being compelled* to incriminate themselves". (Emphasis supplied.)

Also in Miranda v. State of Arizona in 384 U.S. at page 444 and 86 S. Ct. at page 1612, the court defined "custodial interrogation" as follows:

> "By custodial interrogation, we mean questioning initiated by law enforcement officials after a person has been taken into custody *or otherwise deprived of his freedom of action in any significant way.*" (Emphasis supplied.)

From this we can definitely see that the Court was not limiting the rule laid down, as pointed out in Miranda, Esco-

bedo, Massiah[4] and other cases, with reference to the rights of the defendants to just those cases when an arrest had been made by an officer. The Grand Jury is a law enforcement body who investigates, inter alia, alleged violations of criminal law in a secret proceeding. When a potential defendant, and it cannot be disputed that all the record before us definitely shows that the State Attorney and the Grand Jury considered the defendant as a defendant, appears before a Grand Jury and is subjected to a barrage of questions from Assistant State Attorneys, State Attorney, and Grand Jury, alike, he is likely to become confused, nervous, and unable to think clearly. He needs the help of counsel at a time like this.

Since the Miranda case came down, the Supreme Court of Utah in the case of State of Utah v. Ruggeri, supra, dealt with the question of custodial interrogation as used in Miranda and said this at page 973 of 429 P. 2d: "When Brady entered the grand jury room pursuant to a subpoena, he was in custody. He could not leave until he was excused." This is almost an exact statement as contained in the Florida Statutes on this subject.

So it seems very clear to me that when the defendant, in response to the Grand Jury subpoena, entered the Grand Jury Room, he was from that time on "deprived of his freedom of action in a significant way".[5] He could not leave until released. He could not refuse to testify without being in contempt. His only right of protection was his immunity from prosecution for the things he testified about. We therefore come to the other two questions enumerated above namely: Were the requisite procedural safeguards set out in Miranda as necessary demonstrated and if not, did the waiver of immunity become invalid by reason of a lack thereof. I answer the first of the two latter questions in the negative and the last of the questions in the affirmative.

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4. Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 246.

5. Miranda v. State of Arizona, 284 U.S. 444, 86 S. Ct. 1612.

Having determined in my mind that the defendant was in a criminal proceeding and in custody when he appeared before the Grand Jury, and was a potential defendant, any testimony he gave was in violation of his constitutional privilege, regardless of whether he claims or asserts his privilege or not.[6]

Inasmuch, therefore, as the defendant has no alternative about testifying before the Grand Jury, the question of his waiver of immunity became a decisive stage in the proceeding.

In Escobedo, the United States Supreme Court said a party is entitled to the benefit of counsel at the beginning of a decisive stage of the proceeding and determined that "the decisive stage is reached when the investigation has begun to focus on a particular suspect."

There being no question but that the State Attorney and apparently the Grand Jurors, had narrowed their proceeding to further establishing a guilt in the defendant and his codefendant, George Robinson, with regard to the purchases of merchandise from Finkelstein's, the question of waiver of immunity became of greater significance to the rights of the defendant than the actual interrogation. This was a decisive stage. If the defendant refused to sign the waiver, he could not be interrogated about any matter which would be the subject of a later criminal prosecution against him. The record discloses that no warning was given to the defendant prior to the request for his signature to the waiver. He was not advised as to what his constitutional rights were or that he was entitled to counsel at this stage. We do not have to go into the question of whether he would have had a right to counsel during the interrogation—this is not a matter before us—the point is, he should have had advice of counsel as to the meaning of his waiver and its ultimate dire effects upon him in a subsequent criminal trial.

In Miranda v. State of Arizona, supra, at page 1640 of 86 S. Ct., at page 737 of 16 L. Ed. 2d, the Supreme Court said:

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6. People v. Tomasello, 48 Misc. 2d 156, 264 N. Y. S. 2d 686, 690.

> "In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record."

The question has been raised that the defendant was intelligent and experienced and that the rule applied to persons who were ignorant of their rights. The court said in Miranda, supra, "The privilege against self-incrimination secured by the Federal Constitution applies to all individuals, the indigent as well as the affluent."

In Miranda v. State of Arizona, supra, it is said:

> "The absolute requirement of informing a person held for interrogation by a law enforcement officer of his right to consult with a lawyer and to have the lawyer with him during interrogation cannot be met by any amount of circumstantial evidence that he may have been aware of this right."

We further find that the court said in Miranda, that the Fifth Amendment privilege is fundamental to our system of constitutional rule and the expedient of giving an adequate warning. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence or prior contact with authorities, can never be more than speculation; a warning is a clear-cut fact. "More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."

"Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege * * *."

And in summary, the Court said (page 1630, 86 S.Ct., page 726, 16 L. Ed. 2d):

> "To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege; and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. *After such warnings have been given, and such opportunity afforded him*, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. *But unless and until such warnings and waiver are demonstrated by the prosecution at trial*, no evidence obtained as a result of interrogation can be used against him." (Emphasis supplied.)

Therefore, the crucial question involved here is the validity of the waiver and whether it was intelligently waived. The answer to the request for the signature of the defendant to the waiver, in its overall effect, was determinative of whether the defendant could or would be criminally prosecuted. The record before us conclusively shows that the right to counsel at this crucial or decisive stage was neither offered, nor the defendant advised of his right to have one, and therefore, pursuant to the Escobedo and Miranda decisions, the defendant's rights, under the Fifth and Sixth Amendments to the United States Constitution have been violated and the wrongful interrogation of the defendant precludes further prosecution.

I do not consider that the case sub judice comes within some of the borderline cases about which there is considerable debate wherein the warnings must be given to a criminal suspect when picked up by police. In this case, the State apparently had enough evidence upon which to base an indictment, if found to be true, but was insisting on what was probably intended to be a lock and key job against the defendant. The right of the defendant here violated, does not stem from the recent more liberal decisions above, but is one which basically has been an established right for years.

The majority opinion suggests that there are two main questions to be answered, namely: (1) Was the waiver of immunity constitutionally tainted and therefore a nullity because the warnings required by Miranda were not given prior to the waiver and (2) Are the guidelines laid down in Miranda applicable to proceedings before a Grand Jury and if not should this Court extend Miranda to such proceeding?

I believe I have fairly well pointed out supra that interrogation before a Grand Jury is in "custodial interrogation" and that the warnings as provided in Miranda should be given. It is not a question of extending Miranda to cover Grand Jury proceedings.

The majority opinion cites the recent Florida Supreme Court case of Gordon v. Gerstein, 189 So. 2d 873, decided on May 25, 1966, which was some 18 days prior to Miranda, and a rehearing denied September 21, 1966, so that the Florida Supreme Court did not have Miranda before it. But it is significant to note that the Hon. Justice Thomas, who authored that opinon, stated:

> "° ° ° True, investigations by a grand jury are secretly held because the statute requires that they be secret but there is slight if any analogy between such procedure and that followed under Section 27.04 (F.S.). Eventually in his brief the petitioner, himself, submits that there is clearly no analogy between such inquests before a prosecutor and before a grand jury, citing Sections 905.17, 905.24 and 905.27, Florida Statutes, F.S.A."

While Miranda was dealing specifically, as to the four cases before it, consolidated, where the interrogation was in police station and other isolated setting, it did not preclude the rule therein laid down from applying equally in a setting where the defendant was confronted by a hostile barrage of State Attorneys and Assistant State Attorneys, but also, at least, some unfriendly jurors. The transcript of the proceedings before Grand Jury clearly shows that the State Attorney was not overly friendly nor overly zealous in advising the defendant of his rights. True, this occasion occurring within 30 days after Miranda was decided, the State Attorney probably had not seen the guidelines laid down in Miranda, but definitely, *he did not advise* the defendant that he *had a right* to advice of counsel before signing the waiver.

It is farfetched to conceive that the defendant *intelligently* waived his immunity when he had all to lose and nothing to gain thereby. Did the defendant really understand that by refusing to sign the waiver he was protected against prosecution stemming out of matters about which he was to be interrogated?

As pointed out supra, we are not called up here to decide whether a witness is entitled to an attorney at the interrogation before the Grand Jury, but we should decide that at a crucial time prior to interrogation by the Grand Jury the defendant, and definitely he was a defendant, had a right to be advised of his right of counsel before being requested to place himself in a self-incriminating position from which he could not retreat.

Therefore, I think the rule nisi should be issued.

APPENDIX G

OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA FIRST DISTRICT
(Rendered September 15, 1967)

Before WIGGINTON, SPECTOR and JOHNSON, Judges

PER CURIAM.

The Suggestion for Writ of Prohibition filed by Relator herein is denied on the authority of the opinion filed this date in the companion case of State of Florida ex rel. Lowe v. Nelson, 202 So. 2d 232.

WIGGINTON, C. J., and SPECTOR, J., concur.

JOHNSON, J., dissents.

JOHNSON, Judge (dissenting).

I dissent from the conclusion reached by the majority and would grant the Writ of Prohibition for the reasons and upon the authorities cited in the dissenting opinion filed by me in the companion case of State of Florida ex rel. Lowe v. Nelson, 202 So. 2d 232.

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In the
Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 232

WILLIAM OSCAR MATTOX, JR.,
Petitioner,

vs.

DALE CARSON, as Sheriff of
Duval County, Florida,
Respondent.

CECIL FREDERICK LOWE,
Petitioner,

vs.

DALE CARSON, as Sheriff of
Duval County, Florida,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

No.

WILLIAM OSCAR MATTOX, JR.,

Petitioner,

vs.

DALE CARSON, as Sheriff of Duval County, Florida,

Respondent.

CECIL FREDERICK LOWE,

Petitioner,

vs.

DALE CARSON, as Sheriff of Duval County, Florida,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, William Oscar Mattox, Jr., and Cecil Frederick Lowe, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in Appeals No. 27376 and 27386, respectively, on March 25, 1970.*

* Case No. 27376 and Case No. 27386 are consolidated for the purposes of this Petition for Writ of Certiorari pursuant to Rule 23 (5), Supreme Court Rules, in that they involve identical or closely related questions.

Citations to Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit, as of this date unreported, is attached hereto as Appendix A. The opinion of the Court of Appeals for the Fifth Circuit denying the Petition for Rehearing and Petition for Rehearing en Banc, as yet unreported, is attached hereto as Appendix B. The opinion delivered by the United States District Court, for the Middle District of Florida, in granting the petitioners' Writs of Habeas Corpus is recorded in 295 F. Supp. 1054 (Fla. M.D., 1969), and is attached hereto as Appendix C. The opinions of the Supreme Court of Florida, reported in 210 So. 2d 197 and 210 So. 2d 199, are attached hereto as Appendix D and E, respectively. The opinions of the District Court of Appeal of Florida, 1st District, reported in 202 So. 2d 232 and 202 So. 2d 206, are attached hereto as Appendix F and G, respectively.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 25, 1970, (App. A). Rehearing was denied on May 6, 1970, (App. B). This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether compelling petitioners to appear and testify before the Grand Jury by witness subpoena after they became suspects and potential defendants to the larcenies then being investigated by the Grand Jury, was the equivalent of "in-custody" interrogation, rendering a waiver of their rights and privileges conferred by the Fifth Amendment to the Constitution of the United States and Section 932.29, Florida Statutes, in the absence of warnings of their constitutional privileges and full procedural safeguards, void.

2. Whether the scope of *Miranda v. State of Arizona*, is the broad protection of the privilege against self-incrimination including any substitute therefore enacted by Congress and the States in the form of immunity statutes, or, as the Court of Appeals held, is restricted in application to the narrow exclusion of statements obtained from an individual in violation of his constitutional privilege.

Constitutional Provisions and State Statutes Involved

This case involves the Fifth and Fourteenth Amendments to the United States Constitution which provide in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law, . . ."
>
> U.S. Const., Amend. V

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."
>
> U.S. Const., Amend. XIV, Section 1

The laws of Florida applicable to this case are as follows:

> "No person shall be excused from attending and testifying, or producing any book, paper or other document before any court upon any investigation, proceeding or trial, for a violation of any of the statutes of this state against bribery, burglary, larceny, gaming or gambling, or of any of the statutes against the illegal sale of spirituous, vinous or malt liquors, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to convict him of a crime or to subject him to a penalty or forfeiture, but no person shall

be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation or proceeding."

Section 932.29, Florida Statutes, 1965. (Vol. 2, p. 3717)

"Witnesses summoned before a grand jury or in a criminal case pending in court, shall remain in attendance, and shall not depart therefrom unless they are discharged by order of the Court and if they depart without leave they shall be considered in contempt and liable to be attached for the same as in other cases of contempt. All witnesses subpoenaed once in a case shall attend at each succeeding term of court until the case is disposed of."

Section 932.28, Florida Statutes, 1965. (Vol. 2, p. 3717)

Statement of the Case

On July 22, 1966, petitioner, Cecil Frederick Lowe and one George C. Robinson, Sr., were jointly charged in a one-count indictment by the Duval County, Florida, Grand Jury with the offense of Grand Larceny. (L.R. 15-17)* On the

* In this Petition, Petitioners, William Oscar Mattox, Jr., and Cecil Frederick Lowe, will be referred to individually as "Petitioner Mattox" and "Petitioner Lowe" and collectively as "Petitioners". Reference to the record in the Mattox case, filed with the Court of Appeals, and designated as Volume I; Document 1 of the record prepared for purposes of this Petition, will be designated as "M.R." while the record in the Lowe case, filed with the Court of Appeals, and designated as Volume II, Document 2 of the record prepared for purposes of this Petition, will be designated as "L.R.". Reference to the Petition for Habeas Corpus filed in the United States District Court on behalf of Mattox, and contained in Volume III, Document 3 of the record prepared for purposes of this Petition, will be designated as "M.P", while the Petition for Habeas Corpus filed in the United States District Court on behalf of Lowe, and contained in Volume III, Document 4 of the record prepared for purposes of this Petition, will be designated as "L.P." Reference to the Appendix to this Petition will be designated as "App.".

same date, petitioner, William Oscar Mattox, and George G. Robinson, Sr., were jointly charged in a one-count indictment by the same Grand Jury with the offense of Grand Larceny. (M.R. 15-18). On August 10, 1966, the State Attorney filed informations based upon the respective indictments charging petitioners, respectively, with the offense of Grand Larceny, which are the same grand larcenies and the same offenses of Grand Larceny, described in the indictments. (L.R. 1-4; M.R. 1-4). The informations based on the indictments charged in substance that both petitioners, as members of the City Council of the City of Jacksonville, and their co-defendant, George G. Robinson, Sr., stole certain sums of money from the City of Jacksonville, (L.R. 1-4; M.R. 1-4)**

On July 13, 1966 before said indictments were returned, and for an appreciable period of time prior thereto, the same Grand Jury that indicted petitioners had been conducting an investigation and inquiry into larcenies of monies and other personal items of value from the City of Jacksonville. The investigations were in connection with the fraudulent acquisition of personal items of merchandise from the Harry Finkelstein Company of Jacksonville, Florida. The merchandise acquired was for the personal use of certain individuals and was paid for through the City Recreation Department of the City of Jacksonville, by the City of Jacksonville. (L.R. 7-8; M.R. 7-8). Prior to July 13, 1966, the Grand Jury had heard many witnesses' testimony and had adduced before it many documents in reference to said larcenies. (L.R. 7-8; M.R. 7-8). At that time petitioners were definite suspects and potential defendants of said larcenies and were so considered by the Grand Jury. The focus of guilt of said grand larcenies was definitely

** Petitioner Lowe, allegedly stole $850.00 in that he had acquired a Zenith color television set from Harry Finkelstein Company on December 22, 1962, for his personal use, which was paid for by the City of Jacksonville through the Recreation Department of the said City of Jacksonville. (L.R. 1, 31-33). Petitioner Mattox allegedly stole $495.00 in that he had acquired a Zenith stereo set from Harry Finkelstein Company on December 18, 1962, for his personal use, which was paid for by the City of Jacksonville through the Recreation Department of the City of Jacksonville. (M.R. 1, 32-34).

upon petitioners. (L.R. 19-21; M.R. 20-21). These allegations were admitted by the State in its demurrer to the petitioners' motions to quash the informations (L.R. 21-24; M.R. 22-25).

On July 13, 1966, the Grand Jury, notwithstanding the fact that it then considered petitioners definite suspects and potential defendants of the aforementioned offenses of Grand Larceny, later charged in said indictments and informations, issued witness subpoenas requiring petitioners to appear and testify before the Grand Jury. (L.R. 18; M.R. 19). These witness subpoenas were issued and served on petitioners pursuant to Section 932.28, Florida Statutes, (L.R. 18; M.R. 19).

Under subpoena the petitioners appeared separately before the Grand Jury on July 14, 1966. While petitioners were before the Grand Jury in response to the subpoenas, and immediately prior to each testifying before the Grand Jury, the State Attorney presented each Petitioner with and requested that he sign, a purported written waiver of immunity. The waiver was directed to the immunity to which the petitioner would be entitled under Section 932.29, Florida Statutes, in lieu of his privilege to remain silent under the Fifth Amendment to the Constitution of the United States of America. (L.R. 34-40; M.R. 35-41).

Each petitioner at said time and place before the Grand Jury, was not a lawyer, did not have with him a lawyer and had not consulted a lawyer before or during the appearance before the Grand Jury. (L.R. 12; M.R. 12). At no time before the waiver of immunity was handed to each Petitioner with the request to sign it, or at any other time, was either petitioner advised of the following: (1) that he was a definite suspect and potential defendant to the charges of Grand Larceny then being investigated by the Grand Jury; (2) that he had the right to consult with a lawyer in reference to his rights and privileges under Section 932.29, Florida Statutes, and the Fifth Amendment to the United States Constitution or the waiver of any such rights and privileges or in reference to his testimony before the Grand Jury and to have the lawyer with him during

the interrogation before the Grand Jury; (3) that if he did not have the financial ability to pay for an attorney for advice and to represent him before and during the interrogation, an attorney would be appointed to him; (4) that he had the right to remain silent under the Fifth Amendment to the Constitution of the United States unless the immunities and privileges under Section 932.29 were afforded to him; (5) that if he waived the immunities to which he was entitled under Section 932.29, Florida Statutes, that anything he said could be used against him either then for the purpose of returning an indictment, or at a subsequent proceeding or trial; or (6) that he had the right to exercise any of these rights and privileges at any time during the interrogation. (L.R. 11-12; M.R. 11-12).

In the absence of these warnings and in the absence of an explanation of petitioners rights and privileges under the Constitution of the United States, each petitioner signed the purported waivers of immunity before the Grand Jury. (L.R. 34-35; M.R. 35-36).

Neither before nor after the execution of the purported waiver of immunity, and before interrogation, was either petitioner excused from the witness subpoena and told he could leave the Grand Jury room. (L.R. 36-74; M.R. 37-67) Nor, was either petitioner advised by anyone that if he refused to sign the waiver of immunity he would be free to leave the Grand Jury room. (L.R. 36-74; M.R. 37-67). Upon administration of an oath, the State Attorney, Assistant State Attorneys and various members of the Grand Jury interrogated each petitioner at length in reference to the larcenies from the City of Jacksonville. Each petitioner, in response to the interrogation, testified at length and in detail before the Grand Jury, in reference to and concerning the particular Grand Larceny subsequently charged against him in said information and indictment, which testimony disclosed information relevant, material, substantial and pertinent to said Grand Larceny.

After the filing of the informations, petitioners, prior to entering a plea to each information, filed a motion to quash

the information, containing among other grounds, the ground in the nature of a plea in abatement, alleging the facts hereinabove alleged, and praying that the Court enter an order quashing each information and abating said prosecution because, and on the grounds that, in the absence of the warnings of their Federal Constitutional rights, above mentioned, the alleged waivers of immunity executed by the petitioners before the Grand Jury were void, consequently, the petitioners had immunity under Section 932.29, Florida Statutes and for the State of Florida to not dismiss the informations but to continue to prosecute petitioners was in violation of their rights under the Fifth and Fourteenth Amendments to the Constitution of the United States. (L.R. 5-14, 19-20; M.R. 5-14, 20-21). The State of Florida did not traverse or deny the allegations of the petitioners' motions to quash, but filed a demurrer to each motion to quash, which in law, admitted as true all of the allegations contained therein. (L.R. 21-24; M.R. 22-25). The Criminal Court of Record entered an order holding the waivers of immunity executed by petitioners valid, sustained the State's demurrer and denied the motions of petitioners to quash the informations. (L.R. 25-26; M.R. 26-27).

Subsequently, the petitioners filed their respective Suggestions for Prohibition in the Florida District Court of Appeal, 1st District, requesting that a rule nisi issue against the respective Judges of the Criminal Court of Duval County, Florida, from exercising further jurisdiction over the petitioners on the ground that as the purported waivers of immunity, signed under the circumstances described, without the proper Federal Constitutional warnings and safeguards, were nullities, the petitioners were immunized under Section 932.29, Florida Statutes, and were not subject to prosecution, penalty or forfeiture on the charges of Grand Larceny contained in the informations, and for the State of Florida to continue to prosecute them would be in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. (App. F, p. 1).

The District Court of Appeal, in a two-to-one decision, denied each petitioner's Suggestion for Prohibition, holding:

". . . Miranda is applicable to interrogations in the 'isolated setting of the police station' and not those occurring 'in Courts or other official investigations' where there are impartial observers to guard against intimidation and trickery being employed to compel the witness to give evidence against himself."

State ex. rel. Lowe v. Nelson
(Fla. App. 1967) 202 So. 2d 232, 234
(App. F. p. 5)

State ex. rel. Mattox v. Layton
(Fla. App. 1967) 202 So. 2d 206
(App. G.)

The Supreme Court of Florida granted certiorari in each case to the Florida District Court of Appeal, 1st District. The Supreme Court in a per curiam opinion adopted and affirmed the decision of the District Court of Appeal in each case, with two Justices dissenting. See *State ex. rel. Lowe v. Nelson*, 210 So. 2d 197 (Fla. 1968) (App. D), and *State ex. rel. Mattox v. Layton*, 210 So. 2d 199 (Fla. 1968) (App. E).

On September 9, 1968, the petitioners filed their respective petitions for writs of habeas corpus in the United States District Court, Middle District of Florida (L.P.; M.P.). The petitioners alleged in these petitions that they were then held in the custody of the respondent Sheriff under the informations filed as aforesaid, which incarceration was in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States of America in that the failure to give them the warnings of their constitutional rights and privileges under the Fifth Amendment and the substitute therefor, the Florida immunity statute, when they were before the Grand Jury rendered their waivers of immunity void, resulting in their immunization, and for the State of Florida to continue to prosecute them was contrary to the Fifth and Fourteenth Amendments to the Constitution of the United States (L.P.; M.P.).

The United States District Court in granting the writs reasoned that as Florida Statute 932.29 stood in the stead of

the Fifth Amendment, the *Miranda* warnings were necessary to constitute a valid waiver of immunity, and in the absence of the warnings the waivers of immunity are void and petitioners were immunized from prosecution on the charges of Grand Larceny. (App. C).

Respondent appealed to the United States Court of Appeals For The Fifth Circuit. The Court reversed the decision of the District Court holding that *Miranda v. State of Arizona*, 384 U.S. 436 (1966), did not authorize a complete dismissal of the criminal charges by reinstating the immunity rights of the petitioners, but only prohibited the use of the compelled testimony or its fruits in connection with a criminal prosecution (App. A.). Petition for rehearing was denied (App. B.)

Reason for Granting the Writ

I.

The Writ should be granted because the decision of the Fifth Circuit Court of Appeals (App. A.), that failure to give the warnings required in *Miranda v. State of Arizona*, 384 U.S. 436 (1966), does not authorize a dismissal of criminal charges in light of Florida's immunity statute, but only prohibits the use of the compelled testimony or its fruits in connection with a criminal prosecution, decides a question of Federal Constitutional law in a way which conflicts with *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), and *Regan v. People of New York*, 349 U.S. 58 (1955).

The United States District Court held that *Miranda* warnings were required to effectuate a valid waiver of the Florida immunity statute, a substitute for the Fifth Amendment and, absent a valid waiver and in light of the immunity statute, the petitioners were immunized from prosecution. The Court of Appeals reversed saying, "*Miranda* does not authorize a

complete dismissal of the criminal charges by reinstating the immunity rights of the petitioners. (App. A). Instead, the Court of Appeals continued, the immunity is from the "use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying." (App. A). The effect of the decision of the Court of Appeals is that *Miranda* warnings are not applicable to the waiver of substituting and supplanting provisions for the privilege against self-incrimination such as immunity statutes, because immunity statutes provide a different relief than accorded by the Fifth Amendment.

Restricting *Miranda* in this fashion is contrary to the express terms of the applicable immunity statute and is in direct conflict with a long line of decisions of this Court.

This Court has repeatedly held that an immunity statute is a substitute for, and supplants, the Fifth Amendment to the Constitution of the United States. It must, therefore, be as broad in scope as the constitutional guarantee against self-incrimination for which it is substituted or supplanted, and must be liberally construed. *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Brown v. Walker*, 161 U.S. 591 (1896); *Brown v. United States*, 359 U.S. 41 (1959); *United States v. Monia*, 317 U.S. 424 (1943); *Smith v. United States*, 337 U.S. 137 (1949) and *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

The constitutional guarantee against self-incrimination cannot be substituted, supplanted or abridged by legislation unless the legislation (immunity statute) is a full substitute for the guarantee, and to constitute a "full substitute" it "*must afford absolute immunity against future prosecution* for the offense to which the question relates," *Counselman v. Hitchcock*, 142 U.S. 547, 585 (1892) (emphasis added). [See also, *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965), wherein this Court held that to provide less than "absolute immunity" would render *Counselman* illusory.]

The reasoning of this Court has been that a witness does not need an immunity statute to protect him from the use of incriminating testimony he is compelled to give over his objection. The Fifth Amendment protects against this without an immunity statute. *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964); See also, *Adams v. Maryland*, 347 U.S. 179 (1954).

Prior to the decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964), it was generally held that the Fifth Amendment to the Constitution of the United States was not applicable to its full extent to the states. In *Malloy v. Hogan*, 378 U.S. 1, (1964), however, the Court departed from the views formerly expressed in *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947), and expressly held that the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states.

As the Fifth Amendment to the United States' Constitution has been extended, through the Fourteenth Amendment, to the states, (*Malloy v. Hogan*, 378 U.S. 1 [1964]), the Florida immunity statute to be constitutional, must also be a complete substitute and coextensive with the Fifth Amendment to the Constitution of the United States. As Section 932.29, Florida Statutes, gives complete protection to a witness from prosecution or any penalty or forfeiture for or on account of any transaction or matter concerning which he testified, it is valid under the teachings of *Counselman v. Hitchcock*, 142 U.S. 547 (1892) and *Brown v. Walker*, 161 U.S. 591 (1896). It naturally follows that any alleged waiver of the immunity conferred by the statute must be tested by federal constitutional standards the same as a federal immunity statute or a waiver of the Fifth Amendment itself.

In *Smith v. United States*, 337 U.S. 137 (1949), the Court applied the same standards to the alleged waiver of a supplanting immunity statute as are applied to a waiver of the privilege

under the Fifth Amendment. See also: *Stevens v. Marks*, 383 U.S. 234 (1966) holding that the withdrawal of a waiver of the New York immunity Statute was "a matter of federal constitutional law." *Raley v. State of Ohio*, 360 U.S. 423 (1959) holding that a "State may not substitute for the privilege against self-incrimination an intricate scheme for conferring immunity and thereafter hold in contempt those who fail fully to perceive its subtlties."; *Gardner v. Broderick*, 392 U.S. 273 (1968) and *Uniform Sanitation Men's Association, Inc. v. Commission of Sanitation of the City of New York*, 392 U.S. 280 (1968) holding that the waiver of the benefits of a state immunity statute must be tested by the same standards as the waiver of the constitutional privilege which the statute supplants.

The Florida immunity statute is definitely involved with the Fifth Amendment privilege against self-incrimination. It is a substitute for and supplants the constitutional amendment. As a consequence thereof, any waiver of the benefits conferred by the statute must be tested by the same constitutional principles enunciated in *Johnson v. Zerbst*, 304 U.S. 458 (1938) and *Miranda v. State of Arizona*, 384 U.S. 346 (1966).

The immunity conferred by statutes as Section 932.29, Florida Statutes, is not dependent upon the nature of the proceeding in which the party claiming the immunity is compelled to testify or produce evidence. It has long been recognized that producing evidence or giving testimony before a Grand Jury in reference to one of the crimes named in the statute immunizes under the statute. *Counselman v. Hitchcock*, 142 U.S. 547 (1892) (Fifth Amendment held applicable to witness before Grand Jury); *Malloy v. Hogan*, 378 U.S. 1 (1964). (irrelevant that individual was a witness in statutory inquiry as opposed to defendant in criminal prosecution). *State ex. rel. Byer v. Willard*, (Fla. 1951) 54 So. 2d 179 (Florida immunity statute held applicable to a witness before the Grand Jury).

The test of whether testimony given by a witness is sufficiently incriminating to invoke the terms of an immunity statute is not dependent upon whether admissions by them-

selves would support a conviction under a criminal statute. The test is whether any testimony so given in such inquiry constitutes a link in the chain of evidence needed to prosecute such witness thereafter charged for such offense revealed by the testimony he was required to give, whether such testimony is used or not. *Smith v. United States*, 337 U.S. 137 (1949); *Blau v. United States*, 340 U.S. 159 (1950); *Hoffman v. United States*, 341 U.S. 479 (1951); *Estes v. Potter*, 183 F. 2d 865 (5th Cir. 1950). In *State ex. rel. Mitchell v. Kelly*, (Fla. 1954) 71 So. 2d 887, it was held that it is immaterial "whether such testimony is used or not". This is because "where a person has been compelled to give evidence under such circumstances" it is "the fact of the giving it" which immunizes him under Section 932.29, Florida Statutes. *State ex. rel. Byer v. Willard* (Fla. 1951), 54 So. 2d 179, 182.

Each Petitioner was questioned closely before the Grand Jury in reference to the particular Zenith color televison set and the Stereo set which were two of the larcenies being investigated. Further, the petitioners, in response to interrogation, gave answers which definitely incriminated them.

Petitioner Lowe admitted, among other things, (1) that he had obtained the subject Zenith color television from Harry Finkelstein Company (L.R. 41-42); (2) that he was present at Harry Finkelstein Company when the arrangements were being made for him to acquire the television set (L.R. 64); (3) that he had acquired the television set by arrangement with Mr. Robinson, his co-defendant (L.R. 42-43, 64); (4) that he had never paid for the television set (L.R. 46), and (5) that he still had it in his possession (L.R. 46). The testimony of Petitioner Mattox was of the same import, and equally as incriminating. (M.R. 41-52).

The answers given by the Petitioners in this setting before the Grand Jury not only tended to incriminate them, but did incriminate them and furnished links in the chain of evidence needed to prosecute them for the larcenies then being investigated by the Grand Jury and for which they were subsequently indicted and informed against.

At the time they appeared before the Grand Jury, the petitioners were definite suspects and potential defendants to the charges of Grand Larceny under investigation by the Grand Jury. They were the target of the Grand Jury investigation. The State of Florida from the inception of these cases has never contended otherwise. It admitted the status of the petitioners before the Grand Jury by its demurrer to the petitioners' motions to quash in the Criminal Court of Record. (L.R. 21-24; M.R. 22-25).

As a consequence of their status as suspects or potential defendants under subpoena to appear before the Grand Jury, the principles and safeguards of *Escobedo v. State of Illinois*, 378 U.S. 478 (1964), as expanded by *Miranda v. State of Arizona*, 384 U.S. 467 (1966), were applicable to them. The investigation by the Grand Jury into the grand larcenies was no longer a general inquiry into an unsolved crime, but had begun to focus on the petitioners, *Escobedo v. State of Illinois* 378 U.S. 478 (1964).

Petitioners' appearance before the Grand Jury under the circumstance was the equivalent of "in-custody" as defined by *Miranda v. State of Arizona* 384 U.S. 436 (1966).

> "By custodial interrogation we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
>
> 384 U.S. at 444.

The State of Florida initiated the proceeding by issuing the witness subpoena and framed the setting for the compulsive questioning by requiring the petitioner to be present in the isolated chambers of the Grand Jury, separated from relatives and friends. The petitioners were effectively held in the chambers of the Grand Jury by the subpoenas issued and served on them under Section 932.29, Florida Statutes. They could not "depart without leave" and if they did, Section 932.28, Florida Statutes provided," . . ! they shall be considered in contempt and liable to be attached for the same as in other cases of

contempt." The petitioners before the Grand Jury were neither technically nor in reality free to terminate the questioning nor were they free to walk out the door. Each was "deprived of his freedom of action in a significant way."

To testify in a legal proceeding under, and by virtue of, a witness subpoena, is legal compulsion. See *State ex. rel. Reynolds v. Newell* (Fla. 1958) 102 So. 2d 613. Incriminating statements made during the Grand Jury questioning, no less than such statements made during police interrogation, and no less than statements made at a preliminary hearing may be used against the defendant at trial. *White v. Maryland*, 373 U.S. 59 (1963).

Many decisions since *Miranda* have held that a witness suspect and potential defendant, required to appear before the Grand Jury by a witness subpoena, is "in-custody" and the warnings and safeguards required by *Miranda* are applicable to him. In *State of Utah v. Ruggeri*, (Utah 1967) 429 P. 2d 969, the Court in describing the status of a potential defendant subpoenaed before the Grand Jury said:

> "When Brady entered the Grand Jury Room pursuant to a subpoena, he was in custody. He could not leave until he was excused."
>
> 429 P. 2d at 973

To the same effect are: *State v. Sarcone* (N.J. 1967) 233 A 2d 406; *State v. Rosania* (N.J. 1967) 233 A. 2d 413; *Chandler v. Garrison* (E.D. La., 1968) 286 F. Supp. 191; *Sheridan v. Garrison* (E.D. La. 1967) 273 F. Supp. 673 and *United States v. Fruchtman* (N.D. Ohio, 1968) 282 F. Supp 534. See Meshbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1966).

An immunity statute, State or Federal, being a substitute for and supplanting the Fifth Amendment against self-incrimination, *Counselman v. Hitchcock*, 142 U.S. 547 (1892); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *Brown v. Walker*, 161 U.S. 591 (1896), a waiver of its

benefits is in fact the same as a waiver of the self-incrimination clause to the United States Constitution. *Smith v. United States*, 337 U.S. 137 (1949); *Gardner v. Broderick*, 392 U.S. 273 (1968), and *Uniform Sanitation Men's Association, Inc. v. Commissioner of Sanitation of the City of New York*, 392 U.S. 280 (1968). And such waiver is tested and controlled by Federal law. *Brookhart v. Janis*, 384 U.S. 1 (1966); *Stevens v. Marks*, 383 U.S. 234 (1966); *Johnson v. Zerbst*, 304 U.S. 458 (1938).

The petitioners were not given the warnings and safeguards required by *Miranda* before executing the waivers of immunity before the Grand Jury, consequently the waivers were void. *Smith v. United States*, 337 U.S. 137 (1949).

The waivers of the immunity statute being void, the petitioners were immunized by giving their testimony before the Grand Jury under the doctrine of *Regan v. People of New York*, 349 U.S. 58 (1955). In *Regan* an automatic immunity statute similar to Section 932.29, Florida Statutes was involved. The Petitioner, after executing a waiver of immunity under the statute, refused to testify claiming self-incrimination. He was held in contempt. The United States Supreme Court upheld the conviction, holding that the witness must testify because if the waiver was valid he had effectively waived the immunity statute, a substitute for the Fifth Amendment, and his testimony could be compelled. On the other hand, if the waiver of the state immunity statute was invalid the defendant would have immunity under the New York statute for any offense related to his testimony. The Court did not say that the testimony and the fruits thereof would be suppressed, but recognizing that the New York statute was a complete substitute for the Fifth Amendment, said it would be applicable if not properly waived and the relief provided for in the statute would be accorded and the defendant would be immunized.

II.

The Fifth Circuit Court of Appeals, while assuming arguendo that *Miranda* would apply to a Grand Jury investiga-

tion and that the failure to give the proper warnings rendered the waivers of immunity void, restricted the scope of *Miranda* to the exclusion of evidence or the fruits thereof obtained during interrogation of the petitioners. The Court held that this should be done by the trial court, in pre-trial procedures, but refused to apply the Florida immunity statute and bar further prosecution of petitioners as dictated by *Regan v. People of State of New York*, 349 U.S. 58 (1955).

This Court has stated the scope of the required immunity to be as follows:

> "In view of the constitutional provision [privilege against self-incrimination], a statutory enactment, to be valid, *must afford absolute immunity against future prosecution for the offense to which the question relates.*" *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) (emphasis added). See also *Brown v. Walker*, 161 U.S. 591, 595 (1896).

Under this standard, the waivers of immunity being void, petitioners must be immunized against any prosecution for grand larceny.

In *Miranda*, no immunity statute was involved. Consequently, the Court suppressed the tainted admissions and confessions and reversed for new trials. Another result occurs when an immunity statute is involved and the waiver of the immunity thereunder is void. This is clearly demonstrated by *Regan v. People of State of New York*, 349 U.S. 58 (1955) and *United States v. Monia*, 317 U.S. 424 (1943).

In applying a limited scope to *Miranda* the Court of Appeals overlooked the overall purpose of the Supreme Court in *Miranda*. In his opening statement in *Miranda*, Chief Justice Warren stated that the Court was dealing with:

> ". . . the admissibility of statements obtained from an individual who is subjected to custodial police interrogation *and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth*

Amendment to the Constitution not to be compelled to incriminate himself."

Miranda v. State of Arizona
384 U.S. at 439 (1966)
(Emphasis added)

This language clearly shows the intent to protect the privilege under the Fifth Amendment and necessarily any substitute therefor such as immunity statutes. The Court even went so far as to encourage Congress and the States "to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws." *Miranda v. State of Arizona*, 384 U.S. at 467.

If the failure to give the *Miranda* warnings, where an immunity statute is involved, merely results in the witness' testimony and the fruits thereof being suppressed and excluded, then no immunity statute is necessary. The same results are accomplished by the Fifth Amendment to the Constitution. The purpose of such statutes is to obtain evidence and information despite the protection afforded the witness against self-incrimination. See *Brown v. Walker*, 161 U.S. 591 (1896); *United States v. Monia*, 317 U.S. 424 (1943); *Interstate Commerce Commission v. Baird*, 194 U.S. 25 (1904); *Hale v. Henkel*, 201 U.S. 43 (1906); *McAlister v. Henkel*, 201 U.S. 90 (1906); *Smith v. United States*, 337 U.S. 137 (1949).

Although "transactional immunity" has long been thought to be constitutionally required (Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 St. Louis L.Rev. 327, 369 [1966], and has been incorporated into the legislation of most states and virtually all federal regulatory agencies (*Ullmann v. United States*, 350 U.S. 422, 438 (1956); 8 Wigmore, Evidence § 2281, n. 11 [McNaughton rev. 1961]), the Court of Appeals held in this case that "transactional immunity" was not constitutionally required as it exceeded the scope of the Fifth Amendment.

In so holding, the Court of Appeals relied solely on the dictum in *Gardner v. Broderick*, 392 U.S. 273 (1968), calling the language of *Counselman v. Hitchcock*, 142 U.S. 547 (1892) dictum.

Through the years, however, the language of *Counselman*, requiring "absolute immunity" has never been considered dictum, but the law of the case. See *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965) and *Stevens v. Marks*, 383 U.S. 234 (1966). Both *Albertson* and *Stevens*, employing the language of "absolute immunity" from *Counselman* were decided after *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964). *Murphy* and *Counselman* were relied on in *Gardner v. Broderick*, 392 U.S. 273 (1968) for its dictum that a use restriction is sufficient to meet the constitutional privilege.

In *Marchetti v. United States*, 390 U.S. 39 (1968) the defendant, asserting his privilege against self-incrimination, was convicted of conspiracy to evade the payment of the tax on wagering, and the failure to register and pay such tax. There was no immunity statute involved. The Government urged the Court to impose restrictions on the use of information obtained in compliance with the statutes similar to those imposed in *Murphy v. Waterfront Commission of New York*, 378 U.S. 52 (1964). The Court, in reversing the conviction, rejected this suggestion as inappropriate, since Congress intended that the information obtained as a consequence of registration and payment of the tax be provided to prosecuting authorities. To impose such a use restriction would directly preclude effectuation of a significant element of Congress' intent in adopting the very statute.

The Court, in *Haynes v. United States*, 390 U.S. 85 (1968), refused to impose a use restriction on the National Firearms Act for the same reasons stated in *Marchetti* and *Grosso v. United States*, 390 U.S. 62 (1968)

The difference between *Murphy* and *Marchetti* is that in *Marchetti* the Court would not by "use restriction" preclude effectuation of the statute which had as a significant purpose the obtaining of information for the purpose of prosecution. In *Murphy*, however, the Court reasoned that the state had already enacted an immunity statute, and the effect of their decision was merely to impose a use restriction on the evidence in any Federal prosecution. These considerations (in *Murphy*) obviously do not apply when dealing with immunity within a single jurisdiction. The Court of Appeal's reliance on the dictum of *Gardner* was therefore misplaced.

It is clear that the sole purpose of the Florida immunity statute is to obtain information for use in law enforcement and prosecutions. Under the cited authorities, the striking of the immunity provisions of the statute, and the imposition of use restrictions, is tantamount to rewriting the statute wherein it would not provide the absolute immunity required by *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Such a construction negates the legislative intent behind the immunity statute. In *United States v. Monia*, 317 U.S. 424 (1943) this Court in enforcing the provisions of an automatic immunity statute, similar to Section 932.29, Florida Statutes, and holding that the defendants were no longer subject to prosecution because of their testimony before the Grand Jury, said:

> "Beyond dispute the appellees were entitled to immunity from prosecution if the statute is to be given effect as it is written."
>
> 317 U.S. at 426.

The Court's attention is invited to *People v. LaBello*, 301 N.Y.S. 2d 544 (N.Y. 1969) which is factually similar to this case. There the Court of Appeals of New York, in a 4 to 3 decision, ruled in a fashion similar to the Fifth Circuit Court of Appeals in this case, that is the Fifth Amendment to the Constitution did not require absolute immunity, therefore, even though the applicable immunity statute required a "transactional immunity" it and the Constitution were satisfied by a

"use" immunity. On February 27, 1970, the Supreme Court of the United States granted Certiorari in this case. See *Piccirillo v. New York*, No. 1249, 38 U.S.L. Week 3347.

Conclusion

For the above stated reasons, the petition for a writ of certiorari should be granted.

DATED: Jacksonville, Florida, June , 1970

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 232

WILLIAM OSCAR MATTOX, JR.,
Petitioner,

v.

DALE CARSON, as Sheriff of Duval County, Florida,
Respondent.

CECIL FREDERICK LOWE,
Petitioner,

v.

DALE CARSON, as Sheriff of Duval County, Florida,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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Duval County Courthouse
Jacksonville, Florida

RALPH W. NIMMONS, JR.
Assistant State Attorney

Counsel for Respondent

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1664

WILLIAM OSCAR MATTOX, JR.,
Petitioner,

v.

DALE CARSON, as Sheriff of Duval County, Florida,
Respondent.

CECIL FREDERICK LOWE,
Petitioner,

v.

DALE CARSON, as Sheriff of Duval County, Florida,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Assuming *arguendo* that a witness' appearance pursuant to subpoena before a grand jury is a "custodial police interrogation" within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966), does the failure to advise the witness of the so-called "Miranda Warnings" bar the state from prosecuting such witness or, instead, does the failure to so advise

the witness result in the exclusion of the witness' grand jury testimony and the fruits thereof at trial?

2. Were the appearances by Petitioners before the Duval County Grand Jury a "custodial police interrogation" within the meaning of *Miranda v. Arizona*, 384 U.S. 436 (1966)?

3. Did the United States District Court violate 28 U.S.C. Section 2283 by granting habeas corpus which resulted in permanently enjoining the State of Florida from proceeding with the pending criminal cases against Petitioners?

ADDITIONAL STATUTE INVOLVED

In addition to the statutes involved set forth in the Petition for Writ of Certiorari, another statute involved is 28 U.S.C. Section 2283.

STATEMENT OF THE CASE

On July 14, 1966, Petitioners Mattox and Lowe appeared separately, pursuant to subpoena, before the Grand Jury of Duval County, Florida. At the time of their appearances, the Grand Jury was conducting an investigation concerning possible larcenies of monies and other items from the City of Jacksonville, Florida by elected city officials. Petitioners were members of the Jacksonville City Council and were suspects in the larcenies under investigation. (M.R. 8, 20, 22; L.R. 8, 19, 21).*

* In this brief, Respondent will use the same designations which Petitioners used in referring to the record before the Court. Accordingly, reference to the record in the Mattox case, filed with the Court of Appeals, and designated as Volume I, Document 1 of the record prepared for purposes of the Petition herein, will be designated as "M.R.", while the record in the Lowe case, filed with the Court of Appeals, and designated as Volume II, Document 2 of the record prepared for purposes of the Petition, will be designated as "L.R.". Reference to the Petition for Habeas Corpus filed in the United States District Court on behalf of Mattox and contained in Volume III, Document 3 of the record prepared for purposes of the Petition, will be designated as "M.P.", while the Petition for Habeas Corpus filed on behalf of Lowe contained in Volume III, Document 4 of the record prepared for purposes of the Petition, will be designated as "L.P."

Prior to being sworn and interrogated before the Grand Jury, Petitioners were formally and separately advised by the State Attorney of the subject matter of the investigation and of their rights under Section 932.29, Florida Statutes (1965), the Florida immunity statute. (M.R. 38-40; L.R. 37-39). A copy of the immunity statute is reproduced in the Petition at pages 3 and 4. They were advised that, inasmuch as the investigation concerned possible grand larcenies, one of the crimes covered by the immunity statute, and since they were subpoenaed to appear befoer the Grand Jury, the statute would immunize them from prosecution if they testified without waiving their rights under the statute. (M.R. 38-40; L.R. 37-39). After the explanation of the immunity statute, Petitioners were handed written waiver of immunity forms. After reading them each stated he understood his rights and then signed the waiver form, after which Petitioners were sworn and testified before the Grand Jury. (M.R. 35, 39, 40; L.R. 34, 39).** Subsequently, Petitioners were indicted for larceny and the State Attorney, based on the indictments, filed informations against Petitioners in the Criminal Court of Record of Duval County, Florida.

Petitioners moved the trial court to quash the informations alleging that the waivers of immunity under the immunity statute were void since they were not fully advised of the constitutional warnings set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966). (M.R. 11, 12; L.R. 11, 12) On November 18, 1966, the Criminal Court denied the motions. (M.R. 26; L.R. 25).

** The conversation between the Petitioners and the State Attorney concerning their rights under the immunity statute occurred in the Grand Jury room immediately before they, respectively, were sworn and gave testimony. As to Petitioner Mattox, such conversation, along with the written waiver of immunity, is set forth in M.R. 35-41. As to Petitioner Lowe, the similar transaction with the State Attorney, along with the written waiver, is set forth in L.R. 34-40.

Petitioners unsuccessfully urged the same theory by way of suggestions for prohibition in the District Court of Appeal of Florida, First District, and the Florida Supreme Court. (See Petitioners' Appendices D, E, F and G). No petition was filed in the Supreme Court of the United States to review the decision of the Florida Supreme Court. Instead, Petitioners surrendered themselves to the Respondent sheriff and sought a writ of habeas corpus in the United States District Court for the Middle District of Florida. On January 10, 1969, Federal District Court Judge Charles R. Scott entered his Order Granting Petition for Habeas Corpus thereby permanently enjoining the state criminal proceedings then pending against Petitioners. (Petitioners' Appendix C) The United States Court of Appeals for the Fifth Circuit reversed Judge Scott's order in a unanimous decision. (Petitioners' Appendix A). On May 6, 1970, the Court of Appeals denied the Petition for Rehearing. (Petitioners' Appendix B).

REASONS FOR DENYING WRIT

I.

ASSUMING *ARGUENDO* THAT THE QUESTIONING OF A WITNESS BY A GRAND JURY IS A "CUSTODIAL POLICE INTERROGATION" SUCH THAT THE WARNINGS UNDER *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966) MUST BE GIVEN, THE UNITED STATES CONSTITUTION DOES NOT BAR STATE PROSECUTION OF SUCH WITNESS ALTHOUGH AT HIS TRIAL HE WOULD BE ENTITLED TO THE EXCLUSION OF HIS GRAND JURY TESTIMONY AND THE TAINTED FRUITS THEREOF.

In reversing the District Court's order granting habeas

corpus, the Court of Appeals, in its unanimous decision, stated:

> "If appellees were subjected to a custodial interrogation as contemplated by *Miranda,* then the failure to warn them of the constitutional rights due under *Miranda* should be urged in the state court trials as a bar to the admission of any evidence, or fruits thereof, gained during the interrogations. *Miranda* does not authorize a complete dismissal of the criminal charges by reinstating the immunity rights of appellees."

In so reasoning, the Court of Appeals followed this Court's decision in *United States v. Blue,* 384 U.S. 251 (1966). In *Blue,* the defendant was indicted in the United States District Court for the Southern District of California on several tax evasion counts. The District Court granted Blue's motion to dismiss and *barred further prosecution* on the grounds that, because of certain "jeopardy assessments" and the prior Tax Court proceeding, Blue "has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself". The Government contended that the statements made by Blue were exculpatory and did not constitute incriminating evidence. However, the Court stated that it was immaterial, for purposes of the question under consideration, whether the statements were exculpatory or inculpatory. Stated the Court at page 514:

> "Even if we assume that the Government did acquire incriminating evidence in violation of the Fifth Amendment, Blue would at most be entitled to suppress the evidence and its fruits if they were sought to be used against him at trial. While the general common-law practice is to admit evidence despite its

> illegal origins, this Court in a number of areas has recognized or developed exclusionary rules where evidence has been gained in the violation of the accused's rights under the Constitution . . . . *Our numerous precedents ordering the exclusion of such illegally obtained evidence assume implicitly that the remedy does not extend to barring the prosecution altogether. So drastic a step might advance marginally some of the ends served by exclusionary rules, but it would also increase to an intolerable degree interference with the public interest in having the guilty brought to book.*
>
> "We remand this case to the District Court to proceed on the merits, leaving Blue free to pursue his Fifth Amendment claim through motions to suppress and objections to evidence."
>
> (emphasis added)

Blue, supra, was a unanimous decision rendered in 1966, the year the Court decided *Miranda v. Arizona, supra.*

The United States District Court for Delaware cited the *Blue* case in *United States v. Wolfson,* 294 F. Supp. 267 (D. Del. 1968), in holding that, even though he gave incriminating testimony, it was improper to bar prosecution of a grand jury witness merely because he was not advised of certain constitutional warnings. As the District Court properly pointed out:

> "At most he would be entitled to suppress the evidence and its fruits if they were sought to be used at trial; it would not bar the prosecution altogether."
>
> (294 F. Supp. 275)

There is no federal constitutional right to immunity from prosecution. If a grand jury witness waives his right to immunity under the state statute he, of course, may still decline

to answer incriminating questions under the Fifth Amendment. If he incriminates himself and has not been properly warned of his constitutional rights, he is fully protected by the exclusionary rule of evidence approved by the Court in *Miranda, supra.* Stated the Court:

> "More specifically, *we deal with the admissibility of statements* obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."
>
> (384 U.S. 439) (emphasis added)

Petitioners rely heavily upon this Court's decision in *Counselman v. Hitchcock,* 142 U.S. 547 (1892), a reliance which is misplaced. Respondent readily concedes that the immunity statute is "involved" with the Fifth Amendment right against self-incrimination by virtue of *Counselman, supra.* There would be no need for an immunity statute in the absence of Fifth Amendment rights. But neither that involvement nor the *Counselman* case necessitate or require that the waiver of statutory immunity be tested by federal constitutional standards. Appellant submits that such misinterpretation of *Counselman* was the primary reason which led to the erroneous decision in the District Court. The District Court interpreted the phrase from *Counselman* that "the immunity statute supplants the Fifth Amendment and it must be coextensive with it" to mean that the same federal constitutional standards which are applied to test the validity of a waiver of Fifth Amendment rights must also be applied to test the validity of an attempted waiver of the statutory right to immunity. (See Petitioners' Appendix C-9). A close examination of *Counselman* shows such conclusion to be in-

correct. *Counselman* stood for two things: (1) It held that in order to refuse to testify on the grounds of self-incrimination, the forum in which a person attempts to exercise such right need not be a criminal proceeding against him. This is now hornbook constitutional law; (2) In order to compel a person to testify at the risk of contempt penalties, an immunity statute which disallows the use of such testimony in a subsequent criminal prosecution without also prohibiting the use of the leads or fruits thereof is invalid because such statute purports to supplant the Fifth Amendment privilege but is not *coextensive* with such privilege; a person, therefore, may not be held in contempt for refusing to testify where he is not afforded as extensive protection by the immunity statute as by the Fifth Amendment. Respondent readily agrees that in order to compel a witness to testify, *Counselman* requires that the immunity statute must afford complete protection. This is an entirely different proposition from the District Court's holding that a waiver of statutory immunity is void absent *Miranda* warnings.

The case of *Regan v. New York*, 349 U.S. 58 (1955), has also been urged upon this Court by Petitioners as a key authority that, absent the *Miranda* warnings, a purported waiver of a statutory right to immunity from prosecution is void. The *Regan* case is not authority for that proposition. The appeal was from a conviction for contempt of court where the defendant refused to testify before the grand jury after he had expressly waived in writing his right to immunity from prosecution *and* his right against self-incrimination under the Fifth Amendment. The defendant claimed that his waiver of immunity was invalid. He was uncertain as to his status and refused to answer on the grounds that his testimony would tend to incriminate him. The Court affirmed the contempt conviction without determining whether the waiver

of immunity was valid. The Court reasoned that if it were an *invalid* waiver of immunity, he must testify because he could not incriminate himself since he could not be prosecuted; and if the waiver of immunity from prosecution were *valid*, he could not refuse to answer on Fifth Amendment grounds of self-incrimination because he had *also* expressly, and in writing, waived his right against self-incrimination. (See Regan's written waiver reproduced in the Court's opinion at 349 U.S. 60). Unlike Regan, neither Petitioner Mattox nor Petitioner Lowe waived his Fifth Amendment right against self-incrimination. In fact, the Petitioners have alleged that they were never *advised* of their right against self-incrimination. If, in fact, a grand jury appearance *is* a "custodial police interrogation" under the *Miranda* decision, Petitioners are fully insulated from their incriminating statements by the exclusionary rule of *Miranda*.

II.

THE WARNINGS UNDER *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966), WERE NOT REQUIRED TO BE GIVEN PETITIONERS BECAUSE A GRAND JURY APPEARANCE IS NOT A "CUSTODIAL POLICE INTERROGATION".

Petitioners' basic premise that their grand jury appearances were "custodial police interrogations" within the meaning of *Miranda, supra,* is erroneous. The very language of *Miranda v. Arizona, supra* shows that the "warnings" are not applicable to grand jury proceedings. Stated the Court:

> "More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to *custodial police interrogation* . . . ."
>
> (384 U.S. 439) (emphasis added)

* * *

"By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

(384 U.S. 444)

The Court further attempted to put "custodial police interrogation" in proper perspective by stating:

"As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater *than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.*"

(384 U.S. 461) (emphasis added)

In the State Court prohibition proceedings in the instant case, the District Court of Appeal of Florida, First District, (the opinion of which was adopted by the Florida Supreme Court in 210 So.2d 197), pointed out that in *Miranda* and its companion cases (Vignera, Westover and Stewart), they were all interrogated at the station house by the police. The First District opinion then stated:

"In the instant case, the interrogation complained of did not occur while Mr. Lowe was in the custody of the police nor in the private office of a prosecuting official. On the contrary, the interrogation occurred before a Grand Jury composed of the relator's fellow citizens as prescribed by statute. A court reporter was present and the Grand Jury was operating under the direct supervision of the Circuit Court.

* * *

"From what we gather, Miranda is applicable to inter-

> rogations in the 'isolated setting of the police station' and not those occuring 'in courts or other official investigations' where there are impartial observers to guard against intimidation and trickery being employed to compel the witness to give evidence against himself."
>
> (202 So.2d 234, 235)

In *United States v. DiMichele*, 375 F.2d 959 (3rd Cir. 1967), cert. den. 389 U.S. 838, the Court of Appeals held that a witness subpoenaed before a grand jury need not be advised of his constitutional rights. The Court stated:

> "He substantially concedes, as is the fact, that under the existent law a grand jury witness, which is all that appellant was, is not entitled to a warning of right to counsel and to remain silent."
>
> (375 F.2d 960)

The appellant in *United States v. Scully*, 225 F.2d 113 (2nd Cir. 1955) contended that he was not "advised of his constitutional right against self-incrimination" when he appeared, pursuant to subpoena, before the federal grand jury when the "authorities had already marked the defendant for prosecution, intended to indict him and were engaged in bringing his indictment about." The Court held that there was no requirement that a grand jury witness be advised of his constitutional rights, regardless of whether he was a "mere witness" or a potential defendant. The Court stated:

> "These considerations do not apply to the inquisitorial proceedings of a Grand Jury. Such a body is not charged with the duty of deciding innocence or guilt and, for this reason, its proceedings have never been conducted with the assiduous regard for the reserva-

> tion of procedural safeguards which normally attends the ultimate trial of the issues. Thus, in such proceedings, there is no right to counsel, no right of confrontation, no right to cross-examine or to introduce evidence in rebuttal and ordinarily no requirement that the evidence introduced be only such as would be admissible upon a trial. See United States v. Costello, 2d Cir., 1955, 221 F.2d 668."
>
> (225 F.2d 116)

In *Pulford v. United States*, 155 F.2d 944 (6th Cir. 1946), the defendant appealed a conviction contending it was error to introduce certain evidence which he alleged he was compelled to give to the grand jury. The Court found that, although the oral explanation of defendant's constitutional rights was somewhat confusing, the written waiver which defendant signed was clear. In any event, the Court held that it was unnecessary to advise the witness of his right against self-incrimination before the grand jury. In this regard, the Court stated:

> "The written waiver of immunity offered to the appellant to sign was undoubtedly tendered to him in an excess of caution. There was no obligation on the part of the investigators to warn him of his constitutional right to remain silent prior to his examination before the Grand Jury."
>
> (155 F.2d 947)

The Court was not actually dealing with an immunity statute in *Pulford*. The word "immunity" was used in that case to refer to the right against self-incrimination.

In *United States v. Winter*, 348 F.2d 204 (2nd Cir. 1965), Winter complained that his right against self-incrimination

and his right to counsel were violated when he was subpoenaed to appear before the grand jury when he was already a "prospective" or "de facto" defendant and was not advised of his rights to counsel. To such contentions, the Court stated:

> "Short shrift may be made of appellant's claim that the self-incrimination clause of the Fifth Amendment prohibits the Government from ever summoning before a grand jury one who has become a target of inquiry and is a 'potential' defendant. Whatever may be the rule in the State of New York, the Fifth Amendment does not proscribe the practice here inveighed against. Repeatedly this Court has so ruled, declining to equate the position of a 'potential' defendant called before a grand jury with that of one already on trial.
>
> * * *
>
> "To suggest that once an individual is named by witnesses before a grand jury under circumstances which may lead to his indictment he thereby automatically gains immunity from subpoena would denude that ancient body of a substantial right of inquiry.
>
> * * *
>
> "No more successful is appellant's Sixth Amendment claim, which arises out of the omission of the Assistant United States Attorney to advise him of his 'right' to consult with counsel before entering the grand jury room."
>
> (348 F.2d 207, 208)

The *Winter* case can, of course, be distinguished on its facts from the case *sub judice* inasmuch as Winter was convicted of perjury arising out of his grand jury testimony while Peti-

tioners were charged with the substantive offense of larceny. However, Respondent submits that such distinction should not eliminate *Winter* as persuasive authority, particularly since the same Circuit which decided *Winter* had previously reached the same conclusion in a non-perjury case. See *United States* v. *Scully*, *supra*.

The difference between police custodial interrogations and grand jury proceedings is firmly grounded in our country's system of criminal justice. As stated by the Court in *Levine v. United States*, 362 U.S. 610, 617 (1960):

> "The grand jury is an arm of the court and its in camera proceedings constitute 'a judicial inquiry'. Hale v. Henkel, 201 U.S. 43, 66, 50 L.Ed. 652, 662, 26 S. Ct. 270. The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it is attached and to which, from time to time, it reports its findings."

See also *Brown v. United States*, 359 U.S. 41 (1959).

It would be a blow to one of the basic institutions of our society to relegate the grand jury to the status of a "custodial police interrogation". The Petitioners paint a rather grim picture of the grand jury, its motives and purposes. They attempt to create the impression that it is a sinister body serving no other purpose than to intimidate and harass witnesses into confessions. On the contrary, the grand jury is an adjunct or appendage of the court by which it is impaneled; it has no existence apart from that court. 38 Am. Jur. 2d *Grand Juries* § 1. The grand jury is one of the noblest institutions of a free society. As stated by the Honorable

Marion W. Gooding, Judge of the Circuit Court of the Fourth Judicial Circuit of Florida in his Charge to the Grand Jury of Duval County, Florida on May 27, 1966 (the grand jury which indicted Petitioners):

> "There is no greater deterrent to evil and corruption than the inquiring mind and searching eye of a Grand Jury; and it is universally recognized that in time of peace, no citizen assumes a more responsible duty of citizenship than a Grand Juror. No other group of citizens exercises functions more vital to the administration of law and order.
>
> * * *
>
> "It is one of the bulwarks of our liberties, a protection of the innocent and the people's weapon for preventing abusive practices of public officials."

The admonition to the grand jury contained in the latter portion of the statutory oath of grand jurors is significant:

> "You shall present no man for envy, hatred or malice; neither shall you leave any man unpresented for love, fear, favor, affection, reward, or hope thereof, but you shall present things truly as they come to your knowledge, according to the best of your understanding. So help you God."
>
> (§905.10, Florida Statutes, 1965)

The holder of a public office holds his position as a trust which may be withdrawn at any time. The grand jury is peculiarly adapted to inquire into conduct of public officials. As stated by Justice Glenn Terrell in *In Re Report of Grand Jury*, 152 Fla. 154, 11 So.2d 316, 319 (1943):

> "In a democracy, it is not possible for the people individually to know when such trusts are being abused

> so one of the agencies provided to represent and report when abuses are committed is the grand jury."

The Duval County Grand Jury was carrying out one of its most important responsibilities when Petitioners, both elected public officials, were subpoenaed to appear before that body. No sinister motive can or should be attributed to such action.

III.

THE DECISION OF THE COURT OF APPEALS WHICH, IN EFFECT, REINSTATED THE STATE CRIMINAL CHARGES PENDING AGAINST PETITIONERS, WAS CORRECT IN THAT IT UPHELD THE RULE OF COMITY BETWEEN FEDERAL AND STATE COURTS

In its order, subsequently reversed by the Court of Appeals, the District Court concluded:

> "Under the immunity statute, Section 932.29, Florida Statutes, F.S.A., petitioners are released from custody and free from any further criminal prosecution on the charges of grand larceny."
>
> (See Petitioners' Appendix C-10)

In reversing, the Court of Appeals stated:

> "It is thus clear that a federal habeas corpus court must leave such federal questions as may possibly arise under the Fifth Amendment aspect of the Florida Immunity statute to the state trial courts under the exclusionary rule. This includes questions as to the validity of the waivers."
>
> (See Petitioners' Appendix A-4, 5)

In so holding the Court of Appeals recognized the principle of comity between federal and state courts which principle, for so long, has been scrupulously protected by this Court. That principle was expressed in *Baker v. Grice*, 169 U.S. 284, 288 (1898), a habeas corpus case, in which the Court said:

> "From these cases it clearly appears, as the settled and proper procedure, that while Circuit Courts of the United States have jurisdiction, under the circumstances set forth in the foregoing statement, to issue the writ of *habeas corpus*, yet those courts ought not to exercise that jurisdiction by the discharge of a prisoner unless in cases of peculiar urgency, and that instead of discharging they will leave the prisoner to be dealt with by the courts of the State; that after a final determination of the case by the state court, the Federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the Federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the Federal court, upon a writ of *habeas corpus*, be taken out of the custody of the officers of the State and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a State be finally prevented. Cases have occurred of so exceptional a nature that this course has been pursued. Such are the cases *In re Loney*, 134 U.S. 372, and *In re Neagle*, 135 U.S. 1, but the reasons for the interference of the Federal court in each of those cases were extraordinary, and presented what this court regarded as such exceptional facts as to justify the inteference of the Federal tribunal. Unless this case be of such an exceptional nature, we ought not

> to encourage the interference of the Federal court below with the regular course of justice in the state court."

More recently, the Court stated in *Cameron v. Johnson*, 390 U.S. 611, 617 (1968):

> "Federal interference with a State's good-faith administration of its criminal laws 'is peculiarly inconsistent with our federal framework' and a showing of 'special circumstances' beyond the injury incidental to every proceeding brought lawfully and in good faith is requisite to a finding of irreparable injury sufficient to justify the extraordinary remedy of an injunction."

See also concurring Opinion of Mr. Justice Black in *Byrne v. Karalexis*, ... U.S. ....., 90 S. Ct. 1469 (Stay Order Granted December 15, 1969); *Donovan v. Dallas*, 377 U.S. 408 (1964); *Douglas v. City of Jeanette*, 319 U.S. 157 (1942). The District Court's order granting habeas corpus was as effective in terminating the pending state proceedings as the injunctive order involved in *Cameron, supra*.

Congress; also, very early in our nation's history, attempted to prevent conflicts and frictions between federal and state court systems when in 1793, it enacted the forerunner of 28 U.S.C. Section 2283, which presently provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Respondent submits that whether the District Court called its order an order granting habeas corpus or an injunction

prohibiting the state court proceedings is of little moment. The effect is obviously the same. Section 2283 should apply regardless of the legal nomenclature used to describe the order. Recently, in *Atlantic Coast Line Railroad Company v. Brotherhood of Locomotive Engineers*, 38 Law Week 4471 (opinion rendered June 8, 1970), this Court gave full meaning to Section 2283 and stated:

> "Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction. Proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."
>
> (38 Law Week 4473)

In *Atlantic Coast Line Railroad, supra*, the Court recognized that in order for a federal district court to validly enjoin pending state proceedings, the injunction must fall within one of the following exceptions set forth in Section 2283: it must be "expressly authorized by Act of Congress", "necessary in aid of [the District Court's] jurisdiction" or "to protect or effectuate [that court's] judgments." 38 Law Week 4473. Respondent submits that the actions of the District Court patently did not fall within any of such exceptions of Section 2283.

As stated by the Court in *Atlantic Coast Line Railroad, supra*:

> "Again, lower federal courts possess no power whatever to sit in direct review of state court decisions. If the union was adversely affected by the state court's

> decision, it was free to seek vindication of its federal right in the Florida appellate courts and ultimately, if necessary, in this Court."
>
> * * *
>
> "Unlike the Federal District Court, this Court does have potential appellate jurisdiction over federal questions raised in state court proceedings, and that broader jurisdiction allows this Court correspondingly broader authority to issue injunctions 'necessary in aid of its jurisdiction.'"
>
> (38 Law Week 4475)

Petitioner concluded his Petition by citing *People v. La Bello*, 301 N.Y.S. 2d 544 (N.Y. 1969) in which certiorari was granted by this Court *in Piccirillo v. New York*, No. 1249, 38 Law Week 3347 (cert. granted February 27, 1970). Without conceding the factual similarity between *Piccirillo* and the case *sub judice*, it is significant that certiorari was granted in *Piccirillo after* the defendants were tried and convicted in the New York trial court and *after* they had appealed their convictions through the highest appellate court of that state.

After trial and appeal in the Florida courts, review in this Court by way of certiorari will be available to Petitioners. At this point, it would be premature for the Court to exercise its discretion in granting the Petition for Writ of Certiorari.

CONCLUSION

In view of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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